Supreme Court, U.S.
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No. 06- .

IN THE SUPREME COURT OF THE UNITED STATES

HANKIN FAMILY PARTNERSHIP, THOMAS J. TIMONEY, ESQUIRE, As Receiver for the Hankin Family Partnership,

Petitioners,

v.

REALEN VALLEY FORGE GREENES ASSOCIATES

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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Kaplin Stewart, Meloff, Reiter & Stein ("Kaplin") are joint counsel of record in the district court for all Plaintiffs, Petitioners Hankin Family Partnership ("Hankin") Thomas J. Timoney, as Receiver for the Hankin Family Partnership ("Timoney") and Respondents Realen Valley Forge Greenes Associates ("Realen"). Kaplin sued its own clients in state court, Timoney and Hankin, and breached its contractual, ethical and fiduciary obligations to them.

Receiver Timoney discharged Kaplin as counsel. However, Kaplin refused to withdraw as counsel to Timoney and Hankin in the federal district court. Timoney and Hankin filed a motion to discharge and disqualify Kaplin. The district court denied the motion, abstained, and enjoined Timoney and Hankin by requiring them to obtain a Pennsylvania state court decision on whether they may discharge their own counsel in the federal district court.

The United States Court of Appeals for the Third Circuit dismissed the appeal and mandamus, citing a lack of jurisdiction under *Richardson-Merrill*, a case solely concerning counsel's disqualification on a motion by a party-opponent, not the denial of a discharge of a client's own counsel.

QUESTIONS PRESENTED

1. Whether the circuit court erred or abused its discretion in dismissing, for lack of jurisdiction under *Richardson-Merrill*, the appeal of the district court's denial of a client's right to discharge its own counsel, its abstention, and its injunction requiring the client to seek state court approval to discharge its counsel in federal court?

2. Whether the circuit court erred or abused its discretion in denying a Petition for a Writ of Mandamus of the forced legal representation against the will of a client?

LIST OF PARTIES

The Petitioners are The Hankin Family Partnership and Thomas J. Timoney, Esq., as Receiver for the Hankin Family Partnership.

The Respondent is Realen Valley Forge Greenes Associates.

The other parties to the action in the district court are Upper Merion Township, The Board of Supervisors of Upper Merion Township and The Upper Merion Township Zoning Board.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the orders of the United States Court of Appeals for the Third Circuit rendered on July 11, 2006 in both Petitioners' Petition for Writ of Mandamus at 05-1947 and Petitioners' Appeal at 05-1955.

OPINIONS BELOW

The July 11, 2006 Order of the United States Court of Appeals for the Third Circuit, dismissing Petitioners' Appeal No. 06-1955 and dismissing Petitioners' mandamus petition No. 06-1947, is reprinted in the Appendix at 1a-2a. A timely Petition for Rehearing was denied by order dated August 9, 2006, which is reprinted in the Appendix at 42a-43a.

The relevant March 13, 2006 Order of the United States District Court for the Eastern District of Pennsylvania, which precipitated the appeal and mandamus to the circuit court, is reprinted in the Appendix at 3a-5a. Because that order provides "the reasons given for denial of the motion at the March 7, 2006 hearing are incorporated hereto for reference[,]" the relevant portions of the March 7, 2006 hearing are also reproduced in the Appendix at 6a-41a.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the circuit court's decision under 28 U.S.C. §1254(1), as the United States Court of Appeals for the Third Circuit entered an order dismissing the Petition for Writ of Mandamus at No. 05-1947 and the Appeal No. 05-1955 on July 11, 2006. The same order was entered on both dockets. (App. 1a-2a.)

Petitioners filed a timely Petition for Rehearing, which was denied on August 9, 2006. (App. 42a-43a.) This

Petition for a Writ of Certiorari was filed within 90 days of the circuit court's August 9, 2006 denial of Petitioners' Petition for Rehearing.

Petitioners seek a writ of certiorari concerning the circuit court's order dismissing the appeal and petition for a writ of mandamus, in the same Petition, pursuant to Supreme Court Rule 12.4, which directs that "when two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices."

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of a judgment or decree...

* * *

28 U.S.C. § 1292. Interlocutory decisions

(a) Except as provide in subsection (c) and (d) of this section, the courts of appeal shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges

thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;...

* * *

STATEMENT OF THE CASE

A. Factual Background

Since the 1940s, Hankin owned 135 acres of real estate in Upper Merion Township ("the Property"). Because the Property was illegally and restrictively zoned "AG," it was used as a golf course. Hankin spent substantial money, and lost substantial multi-million dollar income for decades, because of the Township's improper zoning and unlawful restrictions of the Property. As one of the last remaining undeveloped real estate parcels in the fully commercially developed King of Prussia area, no one disputes that the Property is extremely valuable. *See Timoney v. Upper Merion Tp.*, 2004 WL 2823227, *1, C.A. No. 2:01-cv-01622-JG (E.D.Pa.,2004).

In June, 1996, Receiver Timoney entered into a Purchase Agreement to sell the Property to Realen, contingent upon commercial development zoning approvals, which would substantially increase the Property's fair market value, and provide for an Additional Purchase Price on the back end of the transaction after the zoning was obtained. The base price was set at $25 million plus certain escalations, and then an Additional Purchase Price based on a formulaic calculation of square footage, units and other density set forth in any development plan ultimately approved for the Property. The Additional Purchase Price could not be calculated at the time of execution of the agreements because a development plan had not yet been

approved by the Township due to its opposition to development. *Id.*

In late 1997, Realen asserted its challenges to the zoning before the Township zoning board. In 1999, the zoning board denied the challenge and, on appeal, the Montgomery County Court of Common Pleas affirmed the zoning board.

After continued resistance to development by the Township, on January 23, 2001, Timoney/Hankin and Realen entered into a Joint Representation Agreement with Kaplin for Kaplin to jointly represent them as plaintiffs in this federal civil rights action and in state court litigation against the Township. Hankin did not assign or transfer any of its claims against the Township to Realen, and did not waive its absolute right to discharge its counsel.

On December 19, 2002, after the Commonwealth Court of Pennsylvania affirmed the decision of the Montgomery County Court of Common Pleas, which had sustained the Township zoning board's denial of the most recent zoning challenge, the Pennsylvania Supreme Court granted *allocatur*.

Shortly thereafter, on January 31, 2003, Kaplin secretly engaged in undisclosed conflicts of interest in this litigation during a time when the co-clients were negotiating over amending the original Purchase Agreement and the original Joint Prosecution Agreement. On January 31, 2003, the Kaplin partner in charge of this litigation on behalf of Petitioners Timoney/Hankin, unilaterally and secretly advised Realen on how to abuse the Joint Representation Agreement to benefit one client (Realen) to the prejudice of the other client (Timoney/Hankin). Without disclosure of these and other substantial conflicts, a week later, on February 8, 2003, the parties executed an Amended Joint

Representation Agreement and an Amended Purchase Agreement.

On April 30, 2003, the state court convened a hearing on its approval of the Amended Purchase Agreement and the Amended Joint Representation Agreement. If these conflicts had been disclosed at or before the April 30, 2003 hearing, the Receiver never would have signed these agreements and the state court never would have approved them.

On December 18, 2003, the Pennsylvania Supreme Court held that the Township's spot zoning of the Property was unconstitutional, and ruled that either of two submitted building application plans (Plan A and Plan B) could be developed. *In re Realen Valley Forge Greenes Associates*, 576 Pa. 115, 135-136, 838 A.2d 718, 730 (Pa.,2003). However, within days of the December 18, 2003 Pennsylvania Supreme Court decision, Kaplin and Realen were again secretly scheming to sell out the Timoney/Hankin claims against the Township for their own benefit, and to the detriment of their clients/partners, Timoney and Hankin.

In blatant and nonconsentable conflicts of interest, Kaplin secretly rendered unilateral legal advice to Realen concerning this litigation, the terms of both agreements, and on Realen "closing" early on the real estate. On June 24, 2004, these Co-Plaintiffs conducted a preliminary real estate closing to transfer title for the Property from Timoney/Hankin to Realen. Shortly thereafter, Kaplin, in concert with Realen, secretly began to delay and prejudice the Hankin/Timoney claims against the Township, including those pending before the district court.

Without disclosure, and in violation of the Pennsylvania Rules of Professional Conduct, Kaplin and Realen schemed to cheat Hankin out of the approximately $45 million Additional Purchase Price, and to unethically

manipulate Kaplin's legal representation to sell out one client's (Timoney/Hankin's) $50-100 million dollar claims against the Township in the federal and state litigations to benefit Kaplin's other client (Realen).

On September 3, 2004, Realen secretly directed Kaplin to "put the brakes on" Timoney/Hankin's litigation against the Township. The motive for Realen's and Kaplin's secret scheme to "put the brakes on" the litigation against the Township was so Realen could attempt to avoid paying the $45 million dollar Additional Purchase Price to Timoney/Hankin, by delaying any development plan for at least one year after transfer of title in the Property. Kaplin and Realen secretly schemed that, after the year had run, they could settle Hankin's claims against the Township for no monetary consideration to Hankin, in exchange for the Township's approval of Plan C - a much higher density development than Plan A or Plan B - and never have to pay the Additional Purchase Price on this higher density Plan C.

Over Receiver Timoney's objections, Kaplin stayed the Timoney/Hankin litigation against the Township. When Receiver Timoney objected and provided Kaplin with a draft of a motion to lift the stay, Kaplin preemptively sued his own clients, Timoney and Hankin, in state court four days later, on March 18, 2005, seeking a declaration that his other joint client, Realen, is not required to pay any of the $45 million dollar Additional Purchase Price to Hankin. *See Realen Valley Forge Greenes v. Thomas J Timoney, As Receiver, And The Hankin Family Partnership* (No. 05-09127) ("declaratory judgment action").

Shortly thereafter, on May 5, 2005, Upper Merion Township approved a preliminary Joint Settlement Agreement between it and Realen to approve a new development Plan C, which is ten (10) times denser than the plans it had previously opposed, in exchange for the promise

that Realen and Kaplin would "cause" the dismissal of Hankin's litigation against the Township. The Township Supervisors and Solicitor admitted in the public record that the Township's approval of this significantly denser Plan C was in exchange for the dismissal of the Timoney/Hankin litigation against the Township. The Upper Merion Township Chairman repeatedly stated on the public record that a potential judgment by Hankin against the Township was over a $1 million dollars an acre, and "you do the math" for this 135 acre Property. The Township Solicitor echoed that the Timoney/Hankin claims were worth "tens of millions of dollars." Another Township Supervisor stated that he was voting to approve the development plan because "the Supreme Court has essentially opened the door for this developer to hold a gun against our head."

On October 3, 2005, Timoney discharged Kaplin as counsel in this action. However, on October 21, 2005, Kaplin improperly and unethically refused to withdraw as counsel for Plaintiffs Timoney/Hankin. Accordingly, Timoney/Hankin filed a Motion to Discharge and/or Disqualify their own counsel in this action because of the ethical violations. Timoney and Hankin feared that their own counsel would seek a voluntary dismissal of their claims pursuant to Fed.R.Civ.P. 41.

B. Proceedings Below

Kaplin argued to the district court that its interpretation of the Joint Prosecution Agreement required that only the state court could rule on the federal court Motion to Discharge and/or Disqualify it. To the contrary, there is no such contractual provision in any agreement. There is also no contractual provision that states that Timoney/Hankin cannot terminate their own lawyer. There is also no assignment of the Timoney/Hankin claims to either Realen or Kaplin.

Neither the district court nor the circuit court ruled on the merits of this important public policy and ethical issue. Instead, after only hearing a brief argument, (App. 6a-41a), the district court denied the Motion to Discharge and/or Disqualify without prejudice, abstained from deciding the issue of Kaplin's discharge based on "comity" to the state court, and issued a mandatory injunction requiring Timoney to seek a state court determination by March 17, 2006 on whether he may discharge his own counsel in this federal civil rights action. (App. 3a-4a.)

On March 17, 2006, Timoney/Hankin filed an Appeal and a Petition for Writ of Mandamus with the circuit court from the district's court's March 13, 2006 order. Before briefing had even been completed, on July 11, 2006, the circuit court entered the same order in both matters, dismissing Petitioners' Appeal No. 06-1955 for lack of appellate jurisdiction under *Richardson-Merrill*, and their petition for writ of mandamus No. 06-1947 as moot and/or lacking merit. (App. 1a-2a.) However, the Panel did not provide any explanation or citation for the denial of the Petition for Writ of Mandamus. Thereafter, on August 9, 2006, the circuit court denied a Petition for Rehearing. (App. 42a-43a.)

After the circuit court dismissed these Appeals on August 9, 2006, Timoney/Hankin's fears were realized on September 29, 2006, when Kaplin filed a Memorandum in the district court seeking, *inter alia*, to dismiss the Timoney/Hankin claims pursuant to Fed.R.Civ.P. 41. On October 30, 2006, the district court convened a conference and advised Kaplin and Co-Plaintiff Realen to file a Motion to Dismiss Plaintiff Timoney's claims.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Public policy and the law require that a client has the absolute right to discharge its own counsel. The circuit court committed an error of law and/or abused its discretion when it relied exclusively upon a blanket application of *Richardson-Merrill v. Koller*, 472 U.S. 424 (1985), and ignored Supreme Court of the United States and its own precedent, including, *U.S. v. Whittaker*, 268 F.3d 185 (3dCir.,2001), to reject appellate jurisdiction of Petitioners' appeals. The issue in *Richardson-Merrill* concerned an immediate appeal by plaintiff after plaintiff's counsel was disqualified on a motion by a party-opponent. In that case, and in virtually every case dealing with disqualification, the client maintained the right to choose counsel.

Here, however, the district court's order denied a client's unconditional right to discharge its own legal counsel, abstained from deciding the ongoing issue of legal representation in the federal court, and entered a mandatory injunction, all of which are immediately appealable under the collateral order and abstention doctrines, and under the federal injunction act. Even absent appellate jurisdiction, the circuit court's refusal to adjudicate the issue is in conflict with case law from the United States Court of Appeals for the Fifth Circuit, requiring the issue to be addressed by writ of mandamus. *In Re Dresser Industries, Inc.*, 972 F.2d 540 (5thCir.,1992).

1. Public Policy And The Law Require That A Client Has The Absolute Right To Discharge Its Own Counsel

This case involves the refusal of a lawyer to be discharged by its client, and forced legal representation against the will of the client.

Relying exclusively upon this Court's decision in *Richardson-Merrill*, the circuit court dismissed the appeal No. 06-1955 for lack of jurisdiction. (App. 1a-2a.) However, *Richardson-Merrill* involved the disqualification of opposition counsel, not the discharge by a client of its own counsel, and abstention, and an injunction.

Richardson-Merrill involved the disqualification of plaintiff's counsel pursuant to defendants' motion for sanctions based on counsel's alleged misconduct, which included the surreptitious taping of a witness statement with a hidden recorder, and public efforts to prejudice the jury pool. *See Richardson-Merrill v. Koller*, 427 U.S. 424, 428 (1985), *reversing Koller By and Through Koller v. Richardson-Merrell Inc.*, 737 F.2d 1038, 1040-41, 237 U.S.App.D.C. 333, 335-36 (D.C.Cir.,1984). Unlike in this case, in *Richardson-Merrill*, after disqualification, the client was able to retain new counsel of its choice.

Here, the district court did not disqualify counsel. Instead, under the district court's March 13, 2006 Order, the clients are literally being "represented," against their will, by conflicted attorneys, who have vowed to prejudice and dismiss one client's (Timoney/Hankin) claims to benefit their other client (Realen). Moreover, and because of the injunction, the Order puts Timoney/Hankin out of federal court.

Additionally, the error is manifest and clear. In the Eastern District of Pennsylvania, all attorneys are controlled by the Pennsylvania Rules of Professional Conduct, including its provisions on conflicts of interest. *Jordan v. Philadelphia Housing Authority*, 337 F.Supp.2d 666, 672 (E.D.Pa.,2004); *International Longshoremen's Ass'n, Local Union 1332 v. International Longshoremen's Ass'n*, 909 F.Supp. 287, 290-94 (E.D.Pa.,1995).

Rule 1.16 of the Pennsylvania Rules of Professional Conduct requires that:

> A lawyer shall not represent a client, or, where representation has commenced, shall withdraw from representation of the client if:
>
> (1) the representation will result in violation of the Rules of Professional Conduct or other law;
>
> * * *
>
> (3) the lawyer is discharged.

Id. (emphasis added). *See also* Rule of Professional Conduct 1.16, cmt. 4 (discharge with or without cause at any time).

This Rule is an absolute rule. Kaplin must withdraw because it was discharged, and also because of its violations of the Rules of Professional Conduct. This absolute requirement is also mandated by Pennsylvania ethical opinions. *See PA Ethical Opinion*, 1998 WL 98811, *2 (1998)(the right to select and discharge a lawyer inheres to the client under Rule 1.2(a) and 1.16(a)(3)); *Phila. Ethical Opinion 87-1*, 1987 WL 109728, *1 (1987)("it is beyond dispute that a client has an absolute right to discharge his lawyer at any time for or without cause"). No misinterpretation of any agreements or other violations of the Rules of Professional Conduct abrogate this absolute Rule.

As a matter of law, "[t]he right of a client to terminate the attorney-client relationship is also an implied term of every contract of employment of counsel." *See Ryan v. Butera, Beasung, Cohen & Brennan*, 193 F.3d 210, 218 (3dCir.,1999) (citation omitted). Significantly, nothing in the Joint Representation Agreement states that Timoney/Hankin cannot terminate Kaplin as their counsel.

Moreover, even assuming *arguendo*, there were any such clear and unambiguous provision prohibiting discharge of counsel, which there is not, "[i]t is undisputed that under Pennsylvania law a client has the absolute right to terminate an attorney-client relationship regardless of the contractual arrangement between the client and attorney." *Crabtree v. Academy Life Ins. Co.*, 878 F.Supp. 727, 730-31 (E.D.Pa.,1995), *aff'd*, 106 F.3d 384 (3d.Cir.,1996) (Table)(*citing Richette v. Solomon*, 410 Pa. 6, 187 A.2d 910, 917 (1963); *Sundheim v. Beaver County Building & Loan Ass'n*, 140 Pa.Super. 529, 14 A.2d 349, 351 (1940); *Hiscott and Robinson v. King*, 426 Pa.Super. 338, 626 A.2d 1235, 1237 (1993), *appeal denied*, 537 Pa. 641, 644 A.2d 163 (1994); *Novinger v. E.I. DuPont de Nemours & Co.*, 809 F.2d 212, 218 (3dCir.,1987)).

As the Court in *Crabtree* stated, an attorney "has no right to prevent a client from terminating an attorney-client relationship." *Id.* Irrevocable representation is against public policy because a client can terminate his relationship with counsel at any time with or without cause. *See Richette*, 410 Pa. at 19, 187 A.2d at 917; *Hiscott and Robinson v. King*, 626 A.2d at 1237; *Sundheim*, 14 A.2d at 351. The United States Court of Appeals for the Third Circuit has recognized a client's special rights and that, while an attorney may only withdraw for reasonable cause and upon notice, "a client may terminate the relationship at any time." *Novinger v. E.I. DuPont de Nemours & Co.*, 809 F.2d at 218.

Richardson-Merrill is therefore not applicable here. Moreover, even assuming *arguendo* that *Richardson-Merrill* might apply in client discharge cases, the circuit court contradicted an earlier decision by holding that *Richardson-Merrill* would be a blanket prohibition to appellate jurisdiction. Six (6) years after *Richardson-Merrill*, in *U.S. v. Whittaker*, 268 F.3d 185 (3dCir.,2001), the circuit court allowed an immediate appeal when the United States

Attorneys' Office was disqualified from representing the Government in the trial court:

> We also recognize that when a court **disqualifies** counsel in a civil case, its order is not immediately appealable. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 426, 105 S.Ct. 2757, 2758, 86 L.Ed.2d 340 (1985); *see also Comuso*, 267 F.3d at 336-37. There, too, however, an appeal after final judgment is not precluded because "if the client obtains an unsatisfactory judgment with substitute counsel, the disqualification ruling may be challenged on appeal of a final judgment." *Id.* at 435, 105 S.Ct. at 2763. Accordingly, *Richardson-Merrell* is no more controlling here than *Flanagan*.

Whittaker, 268 F.3d 185, 192-93 (citations omitted; emphasis added).

Here, counsel was not disqualified. Instead, the district court refused a client the absolute right to discharge its own counsel and to retain substitute counsel. Accordingly, *Richardson-Merrell* is not controlling.

In *Whitaker*, the same circuit court that refused jurisdiction accepted appellate jurisdiction under the collateral order doctrine as espoused in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). *Whittaker*, 268 F.3d at 191-92. Moreover, the circuit court further stated that, had it not exercised appellate jurisdiction, it "could and would exercise mandamus jurisdiction." *Id.* at 193. Indeed, *Richardson-Merrill* also notes that mandamus relief exists for exceptional circumstances. *Richardson-Merrill*, 472 U.S. at 435.

Because *Richardson-Merrell* is not a blanket prohibition of appellate jurisdiction in a disqualification matter, it cannot be a bar to jurisdiction in a case where a client discharged its own counsel as of right.

Indeed, the public policy and ethical rules requiring that a client has the absolute right to discharge its own counsel, especially after learning about secret and serious conflicts of interest and unethical misconduct, requires appellate jurisdiction and impartial oversight. A client's discharge of its counsel affects the integrity of the attorney-client relationship. Where the district court fails to enforce the discharge of a client's counsel, the injured client must have immediate recourse to the impartial appellate courts. *See Montgomery County v. MicroVote Corp.*, 175 F.3d 296, 300 (3dCir.,1999)(important attorney-client issues are immediately appealable under collateral order doctrine). *See also Cohen v. Beneficial Loan Corp.*, 337 U.S. at 545-57.

2. The District Court's March 13, 2006 Order Entering an Injunction Is Immediately Appealable

The district court's Order imposes a mandatory injunction by requiring Timoney to file his Motion to Discharge and Disqualify his own counsel in this federal action in the state court. (App. 4a at ¶5, 5a; App.37a.) A mandatory injunction is immediately appealable on an interlocutory basis. 28 U.S.C. §1292(a)(1). *See also General Electric Co. v. Deutz AG*, 270 F.3d 144, 149 (3d.Cir.,2001).

"Injunctions are appealable without regard to finality, 28 U.S.C. § 1292(a)(1), and this is true of mandatory injunctions—orders to do—as well as of the more common negative injunctions, which are orders not to do, or to stop doing." *Chrysler Motors Corp. v. International Union, Allied Ind. Workers of America, AFL-CIO*, 909 F.2d 248, 249 (7th

Cir.,1990). *See also National Tax Credit Partners v. Havlik*, 20 F.3d 705, 706 (7th Cir.,1994) (order compelling payout to companies investors is appealable as mandatory injunction); *Bogosian v. Woloohojian Realty Corp.*, 923 F.2d 898, 901 (1st Cir.,1991) (order requiring corporation to execute mortgage in favor of shareholders was a mandatory injunction appealable under 28 U.S.C. §1292); *Belknap v. Leary*, 427 F.2d 496 (2d Cir.,1970) (affirmative temporary restraining order requiring police to take certain action is a mandatory injunction and appealable as an interlocutory order under §1292(a)(1)); *Liddell v. Board of Education of the City of St. Louis*, 693 F.2d 721 (8th Cir.,1981) (mandatory injunctions included under §1292(a)(1)).

A mandatory injunction is as "[o]ne which (1) commands the defendant to do some positive act or particular thing; (2) prohibits him from refusing (or persisting in a refusal) to do or permit some act to which the plaintiff has a legal right; or (3) restrains the defendant from permitting his previous wrongful act to continue operative, thus virtually compelling him to undo it." *Black's Law Dictionary*, 705 (5th Ed.1979). "By definition a mandatory injunction imposes an independent, affirmative obligation to take action." *U.S. v. Bedford Associates*, 618 F.2d 904, 914 (2dCir.,1980).

Once the circuit court has appellate jurisdiction because of the mandatory injunction, it also instantaneously has the power to review the entire order, which includes the denial of the Motion to Discharge counsel. *General Electric Co. v. Deutz AG*, 270 F.3d 144, 149 (3d.Cir.,2001); *Marchsak v. Treadwell*, 240 F.3d 184, 190 (3dCir.,2001). *See also Vittoria North America, L.L.C. v. Euro-Asia Imports, Inc.*, 278 F.3d 1076 (10th Cir.,2001); *Helifix Limited v. Blok-Lok, Ltd.*, 2908 F.3d 1339, 1345 (Fed. Cir.,2000); *Quackenbush v. Allstate Insurance Company*,

121 F.3d 1372, 1379 (9thCir.,1997); *Parks v. Pavrovic*, 753 F.2d 1397 (7th Cir.,1985) (injunctions are appealable).

3. The District Court's March 13, 2006 Abstention Order Confers Appellate Jurisdiction

The district court's March 13, 2006 Order abstains to a Pennsylvania state court on an issue that can only be decided by the federal court. The district court's order states that "[a]s a matter of comity, a federal court should defer to the state court..." (App. 3a at ¶3.) This constitutes abstention and is immediately appealable. *See Quackenbush v. Allstate Insurance*, 517 U.S. 706, 713-14 (1996); *Hi Tech Trans, LLC v. C.H.M.M.*, 382 F.3d 295, 302 (3dCir.,2004); *Grode v. Mutual Fire, Marine and Inland Insurance Co.*, 8 F.3d 953 (3d.Cir.,1993).

Although the district court did not identify the abstention doctrine it relied upon, Realen asserted abstention under *Colorado River Conservation Dist. v. United States*, 424 U.S. 800 (1976) in its opposition to Timoney's Motion to Discharge Kaplin as counsel.

An order staying a matter based upon *Colorado River* abstention is immediately appealable. *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1, 11-13 (1982); *Spring City Corp v. American Bldg. Co.*, 193 F.3d 165, 170-71 (3dCir.,1999). Similarly, an order staying a matter based upon *Pullman* abstention is immediately appealable. *Idlewood Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962). An order staying a matter based upon *Younger* or *Burford* abstention is immediately appealable. *Quackenbush*, 517 U.S. at 716; *Hi Tech Tran*, 382 F.3d at 302.

In fact, earlier in this very case, as the law of the case, the circuit court properly exercised jurisdiction of an

abstention order stating "[w]e have jurisdiction to review the District Court's March 22, 2002 order under both 28 U.S.C. § 1291, as the order is final and appealable, and the collateral order doctrine, which allows appellate review of an order staying a federal action under *Colorado River*." *Timoney*, 66 Fed.Appx. at 405 (*citing Quackenbush*, 517 U.S. 706).

Abstention cedes jurisdiction conferred by Congress, and is an exceptional circumstance. As the Supreme Court of the United States stated, "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush*, 517 U.S. at 716 (*citing Colorado River*, 424 U.S. at 821 ("[f]ederal courts have a 'virtually unflagging obligation...to exercise the jurisdiction given them.'"). Similarly, in *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989), the Supreme Court of the United States reversed abstention based upon the *Burford* and/or *Younger* doctrines and stated, "[a]s recently as last term we described the federal courts' obligation to adjudicate claims within their jurisdiction as 'virtually unflagging.'" *Id.* at 359 (citation omitted).

4. Alternatively, A Writ Of Mandamus Is Required

To the extent that appellate jurisdiction is arguably absent, then a writ of mandamus is necessary. It is axiomatic that "one of the inherent powers of any federal court is the admission and discipline of attorneys practicing before it." *In Re Corn Derivatives Antitrust Litigation*, 748 F2d 157, 160 (3dCir.,1984), *cert. denied, Cochrane & Bresnahan v. Plaintiffs Class Representatives*, 472 U.S. 1008 (1985).

As set forth above, Petitioners' right to this Writ of Mandamus is clear and indisputable because a client has the absolute right to terminate an attorney-client relationship regardless of the contractual arrangement between the client and attorney. Pa.R.P.C. 1.16. *See also Richette*, 410 Pa. 6,

187 A.2d at 917; *Sundheim*, 140 Pa.Super. 529, 14 A.2d at 351; *Hiscott and Robinson*, 426 Pa.Super. 338, 626 A.2d at 1237. *See also Novinger*, 809 F.2d at 218; *Crabtree*, 878 F.Supp. at 730-31.

Significantly, Realen never provided the district court with any legal authority that is contrary to the absolute right of a client to discharge its own counsel. The district court never cited to any such legal authority. (App. 3a-5a; App. 6a-41a.) The circuit court did not cite to any legal authority on these public policy merits. (App. 2a.)

The All Writs Act, 28 U.S.C. § 1651, vests discretionary power to issue a Writ of Mandamus in aid of its supervisory control of the circuit court and the district court in the circumstances of this case. A writ of mandamus is proper to correct clear errors of law or abuses of discretion. *See United States v. Wexler*, 31 F.3d 117 (3d Cir.,1994), *cert. denied*, 513 U.S. 1190 (1995).

The circuit court has previously held that an order that sends a case to a stranger court is properly reviewable by a writ of mandamus in order to vacate the unauthorized order. *Allied Signal Recovery Trust v. Allied Signal, Inc.*, 298 F.3d 263, 270 (3dCir.,2002).

Although the United States Court of Appeals for the Third Circuit has yet to address such egregious and ongoing misconduct as Kaplin's breaches of the Rules of Professional Conduct, and declined to do so in this case, the United States Court of Appeals for the Fifth Circuit held that a writ of mandamus is proper to disqualify lawyers in a case where the lawyers filed an unrelated lawsuit against their own current clients. *In Re Dresser*, 972 F.2d at 544-546.

Here, the circumstances are much more compelling than even in *In Re Dresser*. Timoney/Hankin do not seek

disqualification of opposition counsel. They seek to discharge their ***own*** counsel, who has vowed to destroy its own clients' claims and rights. The circuit court was therefore required to issue a writ of mandamus in order to safeguard Plaintiffs' fundamental due process rights and the integrity of the judicial system.

CONCLUSION

The Petition for a Writ of Certiorari to review the order of the United States Court of Appeals for the Third Circuit rendered on July 11, 2006 in both Petitioners' mandamus matter at 05-1947 and Petitioners' appeal matter at 05-1955 should be granted.

Kaplin is simultaneously counsel of record in the district court for Appellants/Movants Timoney and Hankin and for the Appellee/Respondent Realen. Even though Kaplin was discharged by Receiver Timoney as counsel on October 3, 2005, Kaplin refuses to withdraw. Kaplin must be immediately ordered to withdraw as counsel of record for Timoney/Hankin, and disqualified. Public policy requires that a lawyer and a law firm cannot force themselves upon clients. Clients are not chattel that can be bought and sold, and secretly betrayed.

Respectfully submitted,

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Counsel for Petitioners
Hankin Family Partnership and Thomas J. Timoney, as
Receiver for the Hankin Family Partnership

November 2006

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

June 23, 2006
D-129

No. 06-1947 & 06-1955
In Re: HANKIN FAMILY PARTNERSHIP
(E.D. of P.A. Civil No. 01-cv-01622)

Present: FUENTES, VAN ANTWERPEN, and CHAGARES, CIRCUIT JUDGES.

1. Motion by Petitioner's to Consolidate the Cases at Nos. 06-1947 & 06-1955 For all Purposes and to Reset Briefing

2. Response in Opposition by Appellee, Realen Valley Forge Greenes Assoc, and Cross-Motion to Dismiss Hankin Family Partnership as a Party and to Dismiss the Appeal at No. 06-1955

3. Reply to Response by Petitioners

4. Response in Opposition to Cross-Motion to Dismiss Hankin Family Partnership as a Party and to Dismiss the Appeal at No. 06-1955 by Petitioners

5. Motion by Appellee/Respondent, Realen Valley Forge Greenes Assoc, to Dismiss Appeal/Petition as Moot or Barred by Collateral Estoppel

6. Response in Opposition to Motion to Dismiss by Appellants/Petitioners

7. Motion by Respondents/Appellees Upper Merion Township, Board of Supervisors, and the Upper Merion Township Zoning Hearing Board, for Permission to be Excused from Filing a Brief

8. Consent Response by Petitioners

/s/ Chanel R. Graham

Clerk Order dated 6/23/06 Chanel R. Graham 267-299-4955
Case Manager

ORDER

The foregoing motions are ruled on as follows. Appellee's motion to dismiss the appeal at No. 06-1955 for lack of jurisdiction is granted. *See* Richardson-Merrill v. Koller, 427 U.S. 424, 426 (1985) (holding party may not take an interlocutory appeal of a disqualification order but must ordinarily wait to appeal from a final judgment). Appellee's motion to dismiss the petition for writ of mandamus at 06-1947 is granted on grounds of mootness, and because the petition lacks merit. Accordingly, both appeals are dismissed. All other motions are dismissed as moot.

By the Court,

/s/ Franklin S. Van Antwerpen
Circuit Judge

Dated: July 11, 2006

CRG/cc: John M. Elliott, Esq.
Timothy T. Myers, Esq.
Kevan F. Hirsch, Esq.
David J. MacMain, Esq.
Timothy J. Kepner, Esq.
Joseph J. Pizonka, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HANKIN FAMILY PART., et al.,	:	CIVIL ACTION
	:	
Plaintiffs,	:	NO. 01-1622
	:	
v.	:	
	:	
UPPER MERION TOWN., et al.	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 13th day of March, 2006, upon consideration of Plaintiff's Motion to Disqualify Attorneys and the responses thereto, it is hereby ORDERED that said motion is DENIED without prejudice for the following reasons:

1. The reasons given for denial of the motion at the March 7, 2006 hearing are incorporated hereto by reference.

2. The Amended Joint Representation Agreement ("AJRA"), having been approved by the Court of Common Pleas in Montgomery County, is an Order of that Court, and not merely an agreement between the parties.

3. As a matter of comity, a federal court should defer to the state court to interpret, enforce, or amend its own Order, particularly as that Order may affect the rights of the estate for which it has appointed a Receiver.

4. The AJRA on its face requires the Receiver to bring to the Court of Common Pleas in Montgomery County for resolution any dispute it has with other party or parties under the agreement. The Receiver has either already sought, or could seek, resolution of all of the present claims for breach of Agreement in the Court of Common Pleas in Montgomery County pursuant to the AJRA.

5. Accordingly, the Receiver is hereby directed to apply to the Court of Common Pleas in Montgomery County for resolution of the dispute for the claims of breaches of the AJRA. The Receiver contends the other party to the AJRA, Realen, has breached the agreement such that the Receiver now has the right to preclude Realen's attempted court approved global settlement of all pending litigation with the Upper Merion Township, a resolution that the AJRA appears to encourage. The Receiver asserts that it has the unilateral right to terminate the legal representation by the Kaplin Stuart Law Firm and prosecute this civil rights action using substitute counsel over Realen's objections and without direction from the Court of Common Pleas in Montgomery County.

6. Realen's response to the motion to disqualify is that the AJRA is a totally integrated commercial agreement between two parties and is not an attorney-client agreement. This position cannot be said to be frivolous. The AJRA's language appears to support the proposition that the Receiver waived any claim of conflict of interest in legal representation should the Receiver and Realen disagree under the very circumstances presented in the aforesaid motion and response. See 4 of the AJRA, entitled "Prosecution of Additional Actions."

Accordingly, it is hereby ORDERED that this action is STAYED pending application by the Receiver to the Court of Common Pleas in Montgomery County to interpret the AJRA insofar as it relates to any right of the Receiver to prosecute this action separately where Realen seeks, with Township consent, a global settlement of all litigation in state and federal courts. Such application shall be made within ten (10) days from the March 7, 2006 hearing, that is, on or before March 17, 2006.

The Receiver's oral motion for certification of this court's instant order to the Third Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b) is DENIED without prejudice. The Receiver has ten (10) days from the March 7, 2006 hearing, or March 17, 2006, to file a motion, and Respondent Realen shall have ten (10) days after service of the motion to file a response.

BY THE COURT:

s/ James T. Giles

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HANKIN FAMILY PARTNERSHIP, et al.	:	CIVIL ACTION
	:	NO. 01-CV-1622
Petitioners	:	
	:	
vs.	:	Philadelphia,
	:	Pennsylvania
UPPER MERION TOWNSHIP, et al.	:	March 7, 2006
	:	
Respondents	:	CONFERENCE

BEFORE THE HONORABLE JAMES T. GILES
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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- - -

ESR Operator: Frank Houser

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(At 1:54 p.m. in Courtroom 14A.)

DEPUTY CLERK: All rise.

(Ringing sound.)

THE COURT: A capital offense.

(Discussion held off the record.)

THE COURT: Let me have the appearances, please, of the plaintiffs' side, first, the petitioners' side.

MR. WEINRICH: Herman Weinrich on behalf of Thomas Timoney, Receiver for the Hankin Family Partnership, the law firm is Timoney, Knotts (ph).

MR. ELLIOTT: John M. Elliott and Timothy E. Myers on behalf of the Receiver, Timoney and the Hankin Family.

MR. HIRSCH: Kevan Hirsch and David Black on behalf of Realen Valley Forge Greenes Associates.

MR. MacMAIN: David MacMain from Montgomery, McCracken on behalf of the Township and Joe (indiscernible), Solicitor for the Township.

THE COURT: Good afternoon.

UNIDENTIFIED COUNSEL: Good afternoon, your Honor.

THE COURT: All right.

UNIDENTIFIED COUNSEL: Frank M. McKool (ph), your Honor, on behalf of (indiscernible).

THE COURT: Thank you.

UNIDENTIFIED COUNSEL: Your Honor, I think James Schwartzman (ph) is also going to appear on behalf of two of the

Hankin Family members. I believe he's en route, but he may be upstairs and they'll direct him down and James (indiscernible) as well.

THE COURT: Well, we will start.

Each side -- that is the petitioners and respondents -- will have eleven minutes to say whatever you want to say and then, I'll say what I have to say.

MR. MYERS: Your Honor, Tim Myers on behalf of Receiver Timoney and the Hankin Family Partnership.

As we said in our briefs -- and almost everything is in our briefs, although I did bring some additional cases. We did a little additional legal research yesterday and I did bring some extra cases on -- on one issue.

But our motion to disqualify the Kaplin firm is based on the fact that they have been terminated as counsel. They've refused to be -- withdraw as counsel and the conflicts have gone exponentially ever since.

We think the law in this circuit, in this state and in this district is very clear, we keep citing the Crabtree case, but the Crabtree case cites innumerable other cases, including the Pennsylvania Supreme Court that states that:

A client has an absolute right to terminate counsel, no matter what any agreement says.

Our opposition keeps arguing what those papers say. Whenever there is, obviously, a dispute about what those

agreements say, that dispute could last years. It is likely it will last several years at this point.

And the law is clear, no matter even if they're right -- which we, obviously, disagree with -- even if they're right, no matter what that agreement says, we have the right to terminate counsel.

Then, your Honor, once a joint representation fails -- and this is the issue that I did some additional legal research on -- once the joint representation fails, the law firm must be disqualified from the entire case.

And there's a variety of contexts where this has arisen. It has -- the reason I did a little additional research is -- it hasn't arisen, really, much in several years, because the law became settled and nobody did it any more, except in a very unique circumstance where there was either a joint defense or a joint prosecution and here, there was a joint prosecution.

And if I could, your Honor, I'd like to hand up to the Court some case law that -- they're all public -- they're published opinions, but I may be citing to them, may I -- may I approach the Court?

THE COURT: Yes.

MR. MYERS: We cited in our papers for this proposition, the Eddinger (ph) case, which is a Middle District case and the Schwartz (ph) case, which I believe is an Eastern District case.

But there's other cases, the -- the case which is the first case in the pile that I sent you -- that I've handed up to you -- is In Re: Corn Derivatives Antitrust Litigation.

And in that case, your Honor, the Third Circuit held that once a joint representation fails, the firm must be disqualified. They went through several different rationale and reasoning, why that has to happen.

They talked about the joint representation, they talked about the appearance of impropriety. They talked about suing one's client requires disqualification. They talked about the duty of -- of public confidence to the Bar in general. They talked about the duty of loyalty to an existing client and how it cannot be undivided, you can't -- they talked about how you can't choose one client over another. And they talked about, a waiver must be informed. A consent must be informed and there's never any informed consent about being sued in the future. That's just not an informed consent.

They -- so, they had a whole litany of reasons why once a joint representation fails, the -- the law firm must be disqualified. And there are several other cases that hold the same things.

Two -- two cases in this district that are also in there, one was by Judge Joyner, one was by Judge Shapiro. They raised additional issues in addition to the -- the duty of loyalty. They also raise the -- the reason -- another reason

why disqualification is required in the joint-representation context, is because it -- it raises the issue of latent malpractice claim.

And in the -- in the event of a latent or a future malpractice claim, the disqualification has to happen immediately and -- and, your Honor, that exists here.

THE COURT: How?

MR. MYERS: Well, in the joint-representation context, there's now a dispute and you've got to remember, the Kaplin firm is a party to the joint-representation agreement, they signed it.

In the -- in the declaratory-judgment action --

THE COURT: But you -- a county court then approved it?

MR. MYERS: I'm sorry, your Honor?

THE COURT: Didn't a court approve it?

MR. MYERS: The court did approve it, but the court has now determined that there's ambiguities in it.

THE COURT: But the court approved it?

MR. MYERS: Yes, your Honor.

THE COURT: So, it's a court-approved agreement.

MR. MYERS: Yes, but it's been breached.

THE COURT: Well, that --

MR. MYERS: Two reasons --

THE COURT: --raises the issue about whether or not,

I should say anything about my interpretation of what you have before me.

MR. MYERS: There's two reasons why there's potential -- in fact, a very real potential claim from the clients against the law firm.

One is the breach of the contract, the breach of the joint-representation agreement by choosing sides, they've breached the agreement. By suing their own client, they've breached the agreement. By putting the brakes on the litigation, they've breached the agreement.

And the -- and those are breaches and because they're a party, that's a direct claim from the client to the law firm and it also raises the whole issue of the malpractice in the federal inverse condemnation action.

THE COURT: Do you really have an attorney/client agreement?

MR. MYERS: I'm sorry, your Honor?

THE COURT: Or do you have a business agreement?

MR. MYERS: Your Honor, we have -- and -- and the cases I cite to you, address that issue, too, your Honor.

THE COURT: Well --

MR. MYERS: And -- and they say that when an attorney enters an appearance on behalf of a client, it's -- that -- that lawyer is that client's lawyer. There is a clear attorney/client relationship.

And the cases that we cite for that, your Honor, is the Eddinger case, which is in our briefs.

Once -- once you enter your appearance, you represent that client, there's an attorney/client relationship.

THE COURT: Are all of these contract -- there are a lot of represent -- there are a lot of -- there are a lot of things going on in this agreement. It even incorporates, perhaps, the land purchase agreement, agreed?

MR. MYERS: They cross-reference each other, yes, your Honor.

THE COURT: Yes.

Now is one of the remedies you seek recision?

MR. MYERS: We have not asserted our counterclaims and -- and --

THE COURT: Well, but -- but isn't that one of the things that would necessarily have to occur, that is, you're received $27 million for the land.

Have you given it back or tendered it back?

MR. MYERS: No, your Honor.

THE COURT: You could be ordered to tender it back, if this is the -- what you -- what you want, because this is such an integrated document.

Moreover, does the agreement not say, that if the parties have a dispute, that they should go to -- to the county court for resolution?

MR. MYERS: On the dispute, yes, your Honor.

THE COURT: And that's where you are or that's where you can go. That's where you have to go under the agreement, it seems to me.

MR. MYERS: Only if -- if there's a dispute between the parties, your Honor, not on -- it's not -- that's not true with a motion to disqualify the counsel.

If there is a disagreement, the -- the contract talks about two -- actually -- two places to go, one is arbitration and the other is the county court.

THE COURT: Well, one of the consequences of disqualification might be dissolution of other provisions of the agreement.

MR. MYERS: I don't -- I don't believe so, your Honor, but if it is --

THE COURT: Or -- or one of -- one of the pro -- one of the remedies could be specific performance.

MR. MYERS: That's another one of our counterclaims --

THE COURT: But -- but --

MR. MYERS: -- your Honor.

THE COURT: -- those are the kind of things that would be within the province -- it seems to me -- of the -- the court that you've chosen by agreement to -- to decide those matters or in arbitration.

MR. MYERS: Your Honor, not every litigation decision

is to be decided by the county court.

There was a -- there was a dispute resolution procedure, one of two dispute resolution procedures to go to the county clerk. That's the procedure they breached when they sued their own clients.

Rather than -- when -- when the receiver objected to the stay of these proceedings, it notified -- under those provisions of the agreement -- it notified the Realen, its -- its partner -- for lack of a better word -- in this -- this joint prosecution agreement.

And it's the lawyers -- the Kaplin firm stayed this action over the objections of the receiver. That needed to be decided at the time by the county judge.

They circumvented that procedure and they did it in breach of the agreement.

Here we are today on a motion to disqualify. And your Honor -- your Honor is raising what that agreement says and the law in this circuit and in this is, no matter what that agreement says, we have the right to terminate counsel. And once the joint representation is over, the law firm must be disqualified from the entire action.

THE COURT: Well, are you -- but --

MR. MYERS: It --

THE COURT: -- it could be argued that you've sold it away -- that right.

MR. MYERS: No consideration has been passed, your Honor, and that's what we're arguing in the other court and if they --

THE COURT: What do you mean, no -- no consideration? There's consideration written all over this document.

MR. MYERS: The -- the consideration for any settlement of any rights in this action is an additional purchase price.

THE COURT: No, but this -- this action is tied to all of the other actions. There are counsel fees that were undertaken, costs undertaken by Realen.

There is -- this thing about additional money that might be payable to your client.

MR. MYERS: Your Honor --

THE COURT: It's -- it's all over the place.

MR. MYERS: -- your Honor --

THE COURT: Now, why -- why is your client's interest here greater than Realen's?

In 19 -- when was this real estate agreement -- when was the purchase price set for this land?

MR. MYERS: It was paid on June 24th --

THE COURT: No, no --

MR. MYERS: -- 2004.

THE COURT: -- when was the price set?

MR. MYERS: The -- the agreement was executed -- the

amended agreement was executed in May, 2003.

UNIDENTIFIED COUNSEL: The original agreement, your Honor, was 1996.

THE COURT: It goes back to 1996 and 1997.

So, why -- why isn't your sale price from 1997 all that you're entitled to?

MR. MYERS: Because that's not what the agreement says, your Honor --

THE COURT: But --

MR. MYERS: -- the agreement says --

THE COURT: But -- but -- but your complaint about additional damages as a result of some civil rights violations, that might be within the statute of limitations, it seems to me, to be subsumed in your purchase price, which you've agreed to accept and which you have gotten.

Realen is -- is the entity -- it seem to me -- that has not been able to develop the property to realize a greater value than $27 million.

MR. MYERS: Your Honor, we believe our damages are in excess of $200 million, that is an argument --

THE COURT: How?

MR. MYERS: -- that Mr. MacMain can raise on --

THE COURT: No, I'm asking you --

MR. MYERS: -- the merits.

THE COURT: -- within the statute of limitations,

where is your claim for damages -- realistically -- that is above the sale price that you agreed to accept in 1997?

MR. MYERS: That's not the sale price we agreed to accept in 1997, your Honor. There's two parts of the agreement.

There's an original purchase price, a base purchase price and an additional purchase price.

The additional purchase price is based on the market value of the property to be developed after this litigation and it requires the Township to approve certain things, that's what the agreement says.

It's not -- it's not here, write your money and say good-bye, that's what you're buying the property for. If that's the -- if that were the case, we wouldn't have that other action in front of Judge Drayer.

The -- the bottom line is, if -- if Realen thinks that they can proceed with this action, they can do it and they can file anything they want.

If they think they have any claims against us for terminating Kaplin as counsel, they can assert those claims.

They can assert those claims in the declaratory-judgment action or in another court.

But in this court, they -- right now, the Kaplin firm is representing the Hankins' interest and they cannot do so. The joint representation is over. It is ended.

And once that happens -- once they've been terminated

-- they cannot represent anybody in the case, that's what the case law says and those are the numerous cases, I -- I sent up to you.

And, your Honor, if I may just footnote, I -- I --

THE COURT: Wait -- wait just a moment.

(Pause.)

THE COURT: There is a -- the agreement recognizes the possibility that there could arise a conflict between Realen and the Hankin interests over this federal action.

And it claims to be clear about what the rights of the parties are, should that divergence of interest arise, if Realen pursues its obligation to have a -- a successful result as it is defined in the agreement, which is a plan that would -- would be approved by the county court. Correct?

MR. MYERS: It's much more complicated than that, not quite, your Honor, there's -- there's all kind of definitions about what a successful result is and what there is.

The bottom line is, the agreement is a two-part purchase price, the first half of which has been paid. The second of which has not.

And --

THE COURT: But you're -- you're litigating now in state court, this whole thing about this -- this additional amount of money that's to be -- to be paid. I guess, there's an agreement that it's to be paid, the question is, when is it

to be paid, right?

MR. MYERS: Well, they -- I think their -- their position is, it's not -- they don't have to pay it.

THE COURT: Well, but that's something for -- you're litigating that over there --

MR. MYERS: Yes, your Honor.

THE COURT: Okay.

MR. MYERS: And with regard to consent four of the --

THE COURT: But --

MR. MYERS: -- cases I handed up, your Honor.

THE COURT: -- in -- in that action -- in that action, who's -- who's representing the interests of the Hankin Group?

MR. MYERS: We are, your Honor.

THE COURT: Okay.

MR. MYERS: And by the way, your Honor, yesterday Judge Drayer disqualified Mr. Hirsch and Mr. Kaplin from that case. He stopped short at this point of disqualifying the entire law firm.

THE COURT: I received something that said, Judge Drayer has decided that the Kaplin firm is not disqualified from continuing the representation under the – under the joint- representation agreement, is that true?

MR. MYERS: No, your Honor, he disqualified Mr. Hirsch and Mr. Kaplin from the case.

At this point, he has stopped short of disqualifying

the entire firm from that action.

But he made no ruling -- he made no ruling about representing the Hankins, they don't represent the Hankins in that action. They represent Realen against the Hankins in that action.

THE COURT: Well, okay.

When you say that he has stopped short, you mean, he has not disqualified the firm from -- from -- the firm from representing the interests of -- the interests that may arise under the joint-representation agreement?

MR. MYERS: No, he hasn't ruled -- your Honor, no, but that action is a -- a declaratory-judgment action by Realen against Hankin about the rights under the agreement.

In that case, the Kaplin firm represents Realen against Hankin. They -- there was no motion in front of Judge Drayer, as to whether the Kaplin firm can represent Hankin. That was -- that was our motion to disqualify the Kaplin firm from representing Realen in suing its own clients.

THE COURT: Well, I -- I think that's -- Judge Drayer, obviously, is the county court under your agreement, deciding how to -- to make things work out.

MR. MYERS: He -- well, he didn't have -- he was -- nothing about this case was in front of him, your Honor. It's not before the court, all -- what he did was --

THE COURT: Well, if -- if you're talking about

additional monies, it has to refer to something -- it has to touch the agreement somehow.

MR. MYERS: The declaration of rights under the agreement, was he did yesterday was, he disqualified Mr. Hirsch and Mr. Kaplin from acting as counsel in that case.

He has -- he has not yet disqualified the entire firm.

THE COURT: Well, is that -- you say, yet -- is that still an issue --

MR. MYERS: Well, we -- we think --

THE COURT: -- before him?

MR. MYERS: -- we think it is an issue, your Honor.

THE COURT: And you --

MR. MYERS: But it doesn't relate to this -- this --

THE COURT: -- but are you litigating that in any way before -- before Judge Drayer?

UNIDENTIFIED COUNSEL: No.

MR. MYERS: Not at this time, your Honor.

THE COURT: But can you?

UNIDENTIFIED COUNSEL: No.

MR. MYERS: We're not going to be litigating it in front of Judge Drayer, the Kaplin's firm representation of us in this case.

THE COURT: But is -- is the issue of what -- of whether or not, the Kaplin firm can continue to represent the parties under the joint-representation agreement, is that in any

way before Judge Drayer?

MR. MYERS: No, your Honor.

THE COURT: Okay.

MR. MYERS: And if you -- I think we attached the -- the complaint --

THE COURT: But -- but do you have a right to bring it before Judge Drayer, if you wanted?

MR. MYERS: We -- we don't believe so, your Honor, because Judge Drayer --

THE COURT: Could I require you to take it before Judge Drayer?

UNIDENTIFIED COUNSEL: No.

MR. MYERS: I don't see how your Honor could cede jurisdiction.

THE COURT: I'm not ceding jurisdiction, but couldn't I require the parties to -- to bring the action there for --since that's -- that's where all these actions are for -- for -- in the interest of comity to have one court decide what that -- that court has approved as its order?

MR. MYERS: No, your Honor, there is -- this is a federal civil rights action, this is a motion to --

THE COURT: Well --

MR. MYERS: -- disqualify our own counsel.

THE COURT: -- this is an action for money.

MR. MYERS: That's right.

THE COURT: I don't care what you call it, it's an action for money.

MR. MYERS: That's right.

THE COURT: And the issues of comity still apply to civil rights actions brought in federal court.

MR. MYERS: Your Honor, the issue is not before the -- the state court. I don't think it could procedurally ever be put in front of the state court. If it were, it would take years and years and years.

THE COURT: I don't care.

MR. MYERS: Meanwhile, there's prejudice to our claims against the Township.

THE COURT: There's no prejudice to your claims.

Look, you -- you entered in to this joint agreement heads up and if it takes centuries to adjudicate it, that's -- that's what you bargained for in the sense that you went in to it opened eyed.

UNIDENTIFIED COUNSEL: No.

MR. MYERS: Your Honor, we never -- there was no consent for this -- the turning on their own client -- the selling out of their own clients, to choosing clients over the other clients, to filing a lawsuit against their own clients.

There's no consent to that and the cases I handed up to your Honor, the In Re: Corn case, the Third Circuit, right on point.

The Eddinger case, the Schwartz case and the St. Albans case by Judge Shapiro.

THE COURT: But why -- why is seeking a declaratory judgment from the county court, that is obligated -- one might say -- to adjudicate disputes under this agreement, inconsistent with bringing disputes and getting a dispute resolved before the state court?

MR. MYERS: Your Honor --

THE COURT: It's not different than writing a letter. I mean, to get the dispute before the court in a formal way, something has to be done in a formal way and -- so, what's --what's the problem?

I mean, the judge can resolve the -- the issues.

MR. MYERS: Judge Drayer cannot resolve this issue, it's not before the court. It is not before the state court, your Honor. This is a motion to disqualify our own counsel in this federal court. It is -- this Court has jurisdiction over this dispute and must rule on it.

THE COURT: All right.

MR. MYERS: And I think that your Honor will read the cases --

THE COURT: I'll hear from the other side.

MR. MYERS: -- there was a Fifth Circuit case, your Honor, where there was an issue of whether the court should rule or not and it went up to the Fifth Circuit on *mandamus* and the

Fifth Circuit held, there had to be a disqualification.

THE COURT: Yes, sir.

MR. WEINRICH: Your Honor, briefly. Herman Weinrich on behalf of Thomas Timoney, he's the court-appointed receiver, the Montgomery County Court of Common Pleas appointed him. The Pennsylvania Supreme Court affirmed that appointment.

And he's been acting as a legal representative of the entire family as well as an officer of the court with fiduciary obligations.

On behalf of the family and as an officer of the court, Mr. Timoney communicated the termination of the representation under the joint-representation agreement.

Among other things, the joint-representation agreement provides that there should --

THE COURT: Do you have a right to terminate?

MR. WEINRICH: Certainly.

THE COURT: Contractually?

MR. WEINRICH: Certainly.

THE COURT: Where?

MR. WEINRICH: Why would we not have a right, your Honor, if we can select counsel --

THE COURT: What -- where --

MR. WEINRICH: -- why can we --

THE COURT: -- where is it -- do you have a unilateral right to terminate --

MR. WEINRICH: Under the law --

THE COURT: -- under the term -- under the language of the agreement?

MR. WEINRICH: Well, the language of the agreement provides that, in the event a significant action is to be taken, Mr. Timoney would be advised and his input be inquired about.

The significant action in this federal court case is, the litigants stayed the case.

Mr. Timoney as the receiver and the court-appointed officer said, I don't want the case stayed. I want the case to proceed.

THE COURT: Well, you characterize it as significant, others might not see it as significant.

MR. WEINRICH: Well, it's certainly significant, if they're trading off Hankin family property rights, not compensating Hankin and maximizing their development without consideration being paid to the Hankins --

THE COURT: Well --

MR. WEINRICH: -- so that's significant.

THE COURT: -- well, as I understand it, there could be no resolution of this matter, no resolution of any plan without the Court of Common Pleas' approval?

MR. WEINRICH: A resolution of the entire global dispute?

THE COURT: No, no, no --

MR. WEINRICH: Of this federal court case?

THE COURT: No, of the state -- of the zoning issues.

MR. WEINRICH: Well, the -- the Pennsylvania Supreme Court entered an order in December of '03, I believe, that Realen was entitled to definitive relief, which meant they were entitled to get Plan A or Plan B implemented, the additional compensation would be paid and we wouldn't have a dispute.

THE COURT: But under --

MR. WEINRICH: They went with Plan C, your Honor, which includes significant additional densities, which would involve significant more dollars being paid to that Hankin Family Partnership pursuant to the terms of the agreement.

THE COURT: But under the agreement, if they go with Plan A or Plan B or Plan C, that requires court approval.

MR. WEINRICH: Well, when the Supreme Court of Pennsylvania says, you're entitled to definitive relief, then, you're entitled to go and submit the plan as originally submitted.

What they did -- what our adversaries did -- was submit a new plan with higher densities using those --

THE COURT: But doesn't -- but in order for that to -- if the Hankins objected to C and -- and Realen wanted C and the Township wanted C, wouldn't there have to be a hearing before the court to determine whether or not, C would be appropriate?

MR. WEINRICH: But I think the factual premise there,

Hankin objecting, we don't object to Plan C, we object to not being paid for the additional density.

THE COURT: Well, right.

MR. WEINRICH: We have no problem with Plan C being approved, as long as our -- we're being compensated as a result of the increased density.

THE COURT: Right.

And -- and you can get that relief or -- or declaration as to that relief in Montgomery County, can't you?

MR. WEINRICH: Well, part of the litigation involves --

THE COURT: Would it be your obligation on behalf of the Receiver to -- to pursue that -- that relief in the Montgomery County court?

MR. WEINRICH: Well, I think our obligation to the court and to the Hankin Family Partnership is to represent their interest in this litigation in federal court as well as in state court.

THE COURT: All right.

MR. WEINRICH: And we're not being represented when we're terminating our attorneys and someone -- the attorneys refuse to withdraw and then, want to settle the case that we haven't consented to nor been requested.

It was, actually, taken in violation of what we requested.

THE COURT: But -- but it could be that one could interpret this agreement as saying that there's a unilateral right in Realen to -- to stay this action without your consent, if it would result in a successful result under the agreement.

And -- and that would require approval by a court.

MR. WEINRICH: We could involve all kinds of potential factual scenarios, your Honor, but in terms of --

THE COURT: All right.

MR. WEINRICH: -- of --

THE COURT: I'll hear from Realen.

MR. WEINRICH: Thank you, your Honor.

MR. HIRSCH: Good afternoon, your Honor.

I should first like to address the ruling yesterday morning by Judge Drayer.

The ruling was -- and I wanted to be sure, so during the conference call, I asked him twice and I later in the day, reiterated it to him in writing without objection from anyone and we had a subsequent conference call in which the court could have clarified that.

The ruling was, your Honor, that the Kaplin, Stewart firm is not disqualified and that the judge has said, that Marc Kaplin, my partner and I should not act as advocates at trial, because we may be necessary witness -- witnesses.

And the judge -- Judge Drayer -- indicated his ruling was under Rule of Professional Conduct 3.7(a).

And that under 3.7(b), the Kaplin, Stewart firm may continue the representation in the declaratory-judgment action of Realen, because there were no convictions found by Judge Drayer under Rule 1.7 relating to present clients. And Rule 1.9 relating to former clients.

Now, in the -- the motion to disqualify before Judge Drayer, it was argued that the fact that the Kaplin firm represented the Hankins and its Receiver Timoney and Hankins in this action and had filed the declaratory-judgment action on behalf of Realen, created a conflict under either 1.7 or 1.9.

Similarly, it was argued to this Court -- has been argued -- that the filing of the declaratory-judgment action on behalf of Realen, creates an impermissible conflict under Rule 1.7 and Rule 1.9.

I believe, your Honor, that Judge Drayer has resolved that issue.

And he's not made any reservations, he has, in fact, said, that another lawyer from my firm may act as the advocate at trial.

Now, so that to the extent that the motion before this Court is based upon conflicts, I believe that the conflict issue has been resolved.

Secondly, I believe, it's important to get on the record here, what the motivation is here.

The motivation as expressed to the Court during an

off-the-record conference on January 17th, was that the Kaplin, Stewart firm should be discharged as counsel for Receiver Timoney, so that Receiver Timoney can reactivate this litigation and -- and pursue a damages claim against Upper Merion Township.

Well, that -- as we have argued in our briefs -- is an attempt to circumvent and ab -- to circumvent -- the amended- joint prosecution agreement and to abrogate Realen's right to settle this action in its discretion under the circumstances described in Paragraph 7F of the amended-point prosecution agreement.

And that agreement -- as your Honor has pointed out -- is an agreement between two clients. Yes, Marc Kaplin is a signatory to that agreement. The operative terms require him to be, because he's given certain duties and obligations.

And one of the duties is, that in the event that the conflict anticipated by the present situation arises, then he is to follow the dictates of Realen and not Receiver Timoney and the Hankin Family Partnership.

And what we have now, is an attempt to abrogate all of the contractual responsibilities that the Hankins gave away.

And we're gonna put the situation back, have counsel of its choosing, presumably, to do its bidding in terms of what happens with this case.

Now, it was suggested by opposing counsel, that a disqualification is required when a joint representation fails.

I would suggest to this Court, that the joint representation has not failed. That we are in the conflicted situation anticipated by the agreement, itself.

And we -- that my firm is being directed by Realen and we will be directed pursuant to the agreement to settle these cases, is that is Realen's desire and the result is achieved, that Realen desires. And all of the other conditions are met.

And we will not settle these cases or I should properly say, the order that we entered -- that the court entered -- requires us to apply back to the court if a settlement is reached.

We would not make that application unless all of the conditions of the amended-joint prosecution agreement entitling Realen to direct us to settle the case, had been met and we would then, present that to this Court.

So, it's also been suggested that there was something ambiguous about the amended-joint prosecution agreement. Judge Drayer has found that one provision of the amended-purchase agreement is subject to question and he is going to hear evidence on that. But there has been no such finding that the amended-joint prosecution agreement is ambiguous in any respect.

It's also been suggested that there were breaches and fiduciary responsibilities that were ignored. But I haven't heard anything concrete and I haven't heard any evidence about it.

So, what we deal with here, is a request to this Court to now, if -- if counsel is going to continue to argue the conflict issue -- now, counsel wants this Court to flirt with the comity issue involved, where the same arguments are being made before a state and federal court.

It wants to say, that this Court can, almost, backhandedly terminate Realen's rights to -- to resolve this situation and to resolve this case.

I don't believe that the situation that is being described by opposing counsel exists. The situation exists that one party had made an agreement that they want to get out of now and that's why a disqualification had been sought and a termination has been sought.

So, when one considers the motivation that the -- the Receiver Timoney and the Hankin Family Partnership wished to reactive this litigation and pursue a damages claim, then it becomes apparent that the termination is an attempt to abrogate Realen's right to resolve the cases under the agreement.

Finally, as the Court has pointed out, there is -- there can be some question whether action is significant or not significant.

But it's also been suggested that by not going to the county court under the joint-prosecution agreement, somehow Kaplin, Steward breached an obligation under the amended-joint prosecution agreement.

Well, as we have pointed out before and as can be seen in the various exhibits, Receiver Timoney was informed by our firm, that we did not believe that a stay was significant action, which would require the county court to address it under the amended-joint prosecution agreement.

Receiver Timoney disagreed, filed the petition and we were there and the end result was, that the -- nothing further has been done on the petition to lift the stays of these actions.

THE COURT: All right. Thank you.

MR. MYERS: Your Honor, may I have a minute for rebuttal?

THE COURT: No.

I've got a jury coming in at -- absolutely -- at twenty minutes of 3:00 in a criminal case.

I've read your papers and I've heard your arguments.

(Pause.)

THE COURT: The motion to disqualify is denied.

The amended joint-representation and joint-prosecution of litigation agreement, it's clear to me in several respects -- most importantly -- it is that a dispute between the parties about what might constitute a successful result, what might constitute a breach would require specific performance and the like are to be represented to the county court for resolution.

I refer to Page 11 of that agreement.

And it's particularly the obligation of the Receiver to participate or initiate declaratory-judgment actions, if necessary in the state court for resolution of such disputes.

I'm satisfied that the state court is handling or can handle the resolution of any and all of these disputes.

And I direct the Receiver as the plaintiff in this action on behalf of the Hankin family and Realen to file a declaratory-judgment action in Montgomery County for resolution of any and all of these disputes.

As a matter of comity, this Court will not substitute its judgment for the judgment of the state court, which has approved this agreement as part of its order, as it has entered an order, which is this agreement.

This is not just an agreement between the parties, this is a court order.

And so, this Court will not take it upon itself to interpret a court order, Montgomery County is the court -- whether it's Judge Drayer or some other judge -- to resolve these disputes.

(Pause.)

THE COURT: And I'm very settled in that notion, because the agreement, itself -- the court order, itself -- is sufficiently clear that the overriding object of the parties' agreement -- the parties being Realen and the Hankin interests -- is to obtain a successful result as it is defined in this

agreement on Page 9.

And that agreement is to have a final and unappealable order of a court which approves an agreement between Realen and the Township for the development of the property for the permitted uses. Option C is within the permitted uses.

On Page 9, it is very clear, that -- on Page 9 and Page 11 -- and some others -- that it is not obligatory on the part of Realen to pursue this action in this court, if it could obtain a successful result, otherwise.

(Pause.)

THE COURT: Therefore, in the interests of comity, this matter is stayed pending a decision by the Court of Common Pleas of Montgomery County as to this issue of representation, if that is to be pressed by the Timoney/Hankin interests.

As a matter of practicality, I'd say to the parties, if I had to decide this matter, it would not be in favor of the arguments that have been raised by the Timoney interests in this action.

So, if you want to bring it back here, you pretty much know what you have to deal with. I'm not adverse to rendering an opinion on the merits of the issue. The merits of the issue being a reading of the -- the agreement between the parties.

This is not an attorney -- this is not really an attorney/client agreement, it's an agreement between two parties, it's a business deal, pure and simple.

And it appears that the parties agreed -- the business interests agreed -- to utilize the -- the Kaplin firm, seeking a resolution of a dispute before the court, that's -- the parties have agreed should resolve their dispute before the court that has ordered that the parties come to it to resolve this dispute, to me is not a breach of attorney/client relationship.

However, if the Court of Common Pleas of Montgomery County wishes to direct the parties, so that there can be a fair representation of the interests in the dispute before it, for resolution of disputes regarding -- arising out of this agreement -- it's up to the -- that court.

This constitutes the Court's findings and rulings with respect to the pending motion.

MR. MYERS: Your Honor, we're respectfully requesting that you certify the issue for appeal to the United States Court of Appeals for the Third Circuit?

THE COURT: Brief it.

To me it's not apparent that it's so clear that there is an appealable issue for the reasons stated, brief it within ten days. The other side will have ten days.

And advise Judge Drayer, please or the Chief Judge of the Court there, of this direction to the Receiver.

MR. MYERS: Okay.

THE COURT: And let me know within ten days, that you've complied with this Court's order.

Thank you.

MR. HIRSCH: Thank you, your Honor.

ALL COUNSEL: Thank you, your Honor.

MR. WEINRICH: Your Honor, I'm -- I'm sorry. I missed what you said about showing within ten days about complying --

THE COURT: I've directed the parties to bring an action, if necessary in the Court of Common Pleas for a resolution of any and all disputes arising under the

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court's order, which is this agreement.

MR. WEINRICH: Which will be part of what we've asked for the 1292(b) certification on --

THE COURT: Yeah.

MR. WEINRICH: We'll brief that.

THE COURT: No briefcases on the table.

MR. WEINRICH: Oops.

No briefcase -- we'll brief that, your Honor.

Thank you.

THE COURT: Don't brief the briefcases on the table.

MR. WEINRICH: No, we're going to brief the 1292(b).

THE COURT: Good. Thank you. Bye-bye.

MR. HIRSCH: Thank you, your Honor.

(Adjourned in this matter at 2:42 p.m.)

* * *

CERTIFICATE

I do hereby certify that the foregoing is a correct transcript of the electronic-sound recording of the proceedings in the above-entitled matter.

/s/ Gail Drummond Date: March 8, 2006

Gail Drummond
28 8th Avenue
Haddon Heights, New Jersey 08035
(856-546-6270)

D-129

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1947

IN RE: HANKIN FAMILY PARTNERSHIP; THOMAS J. TIMONEY, ESQUIRE, As Receiver for the Hankin Family Partnership

Petitioners

No. 06-1955

HANKIN FAMILY PARTNERSHIP; REALEN VALLEY FORGE GREENES ASSOCIATES; THOMAS J. TIMONEY, Esq.
As Receiver for the Hankin Family Partnership

v.

UPPER MERION TOWNSHIP; THE BOARD OF SUPERVISORS OF UPPER MERION TOWNSHIP; UPPER MERION TOWNSHIP ZONING HEARING BOARD

Hankin Family Partnership; Thomas J. Timoney, Esq.,

Appellants

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, FISHER VAN ANTWERPEN and CHAGARES, Circuit Judges

---

SUR PETITION FOR REHEARING

WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Petitioners/ Appellants having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is hereby denied.

By the Court,

/s/ Franklin S. Van Antwerpen
Circuit Judge

Dated: August 9, 2006

CRG/cc: John M. Elliott, Esq.
Timothy T. Myers, Esq.
Kevan F. Hirsch, Esq.
David J. MacMain, Esq.
Timothy J. Kepner, Esq.
Joseph J. Pizonka, Esq.

No. 06-646

IN THE

Supreme Court of the United States

THOMAS J. TIMONEY, ESQUIRE,
As Receiver for the Hankin Family Partnership,

Petitioners,

v.

REALEN VALLEY FORGE GREENES ASSOCIATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether Petitioner has presented any compelling reason to depart from this Court's settled precedent that an order denying a motion to disqualify counsel in a civil case is not appealable under 28 U.S.C. § 1291 or the collateral order doctrine.

Whether Petitioner has presented any compelling reason to depart from this Court's settled precedent that interlocutory injunctive orders must relate to the merits of an action to be immediately appealable under 28 U.S.C. § 1292(a)(1).

Whether there is any compelling reason to view the order in question as an appealable exercise of abstention when the District Court has already reopened proceedings on the merits and is considering a motion to dismiss the entire action with prejudice over Petitioner's objections.

Whether Petitioner has presented any compelling reason to review the finding of the Court of Appeals that his petition for mandamus is moot or its holding that the petition lacks merit.

LIST OF PARTIES

The only proper Petitioner is Thomas J. Timoney in his capacity as the Receiver for the Hankin Family Partnership (the "Receiver"). The Hankin Family Partnership ("Hankin") was removed as a plaintiff in this action in the First Amended Complaint filed in 2001 and has never sought to be reinstated or requested leave to intervene. Hankin simply appeared on the motion to discharge or disqualify counsel.

Respondent Realen Valley Forge Greenes Associates ("Realen") is a Pennsylvania General partnership and its partners are Northwestern Mutual Life Insurance Company and Realen Golf Communities, L.P.

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INTRODUCTION

Petitioner has presented no "compelling reason" why his Petition for a Writ of *Certiorari* (the "Petition") should be granted. While offering a multitude of theoretical complaints about the Third Circuit's dismissal of his appeal and petition for mandamus from an order denying a motion to discharge or disqualify counsel, he has flatly failed to demonstrate that the ruling is in conflict with any decision of this Court or another Court of Appeals, or that an important federal question that has not been settled by this Court is implicated.

Over twenty years ago, this Court issued a series of decisions holding that orders relating to disqualification of counsel are not immediately appealable under 28 U.S.C. § 1291 or the collateral order doctrine. Petitioner has offered no compelling reason to depart from that precedent, which has been universally followed in civil cases by all of the Circuit Courts.

Nor has Petitioner offered any compelling reason to question the Third Circuit's rejection of his attempts to characterize, and thereby transform, an order denying a disqualification motion into a mandatory injunction or an exercise of abstention. Even if that transformation could magically occur, the so-called "mandatory injunction" is not appealable under 28 U.S.C. § 1292(a)(1) because it does not relate to the merits of this civil rights action. Nor has there been an immediately appealable exercise of abstention because the District Court denied the disqualification motion without prejudice to renewal after Petitioner obtained a non-binding interpretation of his contract with Realen relating to joint representation in and prosecution of this action from the state court. Again, no other Circuit Court has issued a decision which conflicts with the one here by the Third Circuit.

Furthermore, if there was an exercise of abstention, it is now over. Before the Petition was filed, the District Court directed Realen to file a motion to dismiss this action with prejudice and Realen has so moved on the grounds of a fully executed settlement agreement with the defendants which fulfills all of the conditions to Realen's right to settle this action without the consent of Petitioner under his contract with Realen. The Petitioner has opposed the motion on various grounds through separate counsel and the District Court is presently considering it. Thus, any delay in a federal adjudication has ended.

Petitioner merely mentions, without discussion, the finding of the Court of Appeals that his petition for mandamus is moot, offering no reason whatsoever to question or review that finding. Petitioner simply repeats a few of the arguments raised in the petition for mandamus below, which the Court of Appeals also found to lack merit, offering no justification for issuance of a writ of *certiorari*.

COUNTER-STATEMENT OF THE CASE[1]

A. Factual Background

The relationship between Realen and Thomas J. Timoney in his role as Receiver for the Hankin Family Partnership ("Hankin") began in 1996 and is governed by a series of agreements that have been adopted as orders by the Court of Common Pleas of Montgomery County, Pennsylvania (the "State Court"). In particular, their relationship in this litigation is governed by the terms of an Amended and

[1] While cognizant of their duty to address misstatements of law or fact, counsel for Realen believe that there are so many in the Petition that a complete restatement of the case best serves that function.

Restated Agreement Concerning Representation and Joint Prosecution dated May 8, 2003 (the "AJPA"). This case was instituted under the first version of that contract.

The series of contracts began in 1996, when Realen entered into a Purchase Agreement with Timoney to buy the last remaining asset of Hankin, the Valley Forge Golf Course (the "Property") located in Upper Merion Township, Pennsylvania (the "Township"). Due to the Township's long-standing resistance to development, Realen's obligation to purchase the Property was contingent upon a change in zoning to allow commercial development and receiving final approvals to commence building. While required to close on the Property once it had obtained final development approvals, Realen has always had the right to close before those contingencies occurred.

Realen filed a challenge to the agricultural zoning of the Property in 1997, which the Township's Zoning Hearing Board ("ZHB") eventually denied in 1999. Realen appealed the adverse ZHB decision to the State Court, which affirmed the ZHB on December 1, 2000. After discussion of the potential for Realen to bring and pay for the prosecution of other actions against the Township, Realen and Timoney agreed that Realen would pay for its lawyers to bring two separate lawsuits against the Township, which are referred to as the "Additional Actions" – an inverse condemnation action in the State Court and this federal civil rights action in which Timoney and Realen brought § 1983 claims for damages and requested a declaration that the zoning of the Property was unconstitutional.

The primary interest of the parties in instituting the Additional Actions is expressly stated in the AJPA and its predecessor as obtaining "a court order permitting the

development of the Property as a Retail/Hotel/Apartment Facility or as a Retail/Hotel/Office Facility, or in causing the Supervisors to settle the Zoning Appeal and the Additional Actions by permitting Realen to develop the Property. . .". It was, however, recognized that Timoney's primary interest could change to obtaining a monetary award, which had the potential to be at odds with Realen's interest in development of the Property. The AJPA expressly recognized that if this potential conflict arose, Realen would have sole discretion to settle the Additional Actions without any monetary payment by the Township if the settlement between Realen and the Township would permit development of the Property.

The AJPA provides that in the event that the conflict arises, Realen has the right in its sole discretion to settle the Additional Actions without Timoney's consent:

> Because of the foregoing potential conflict of interests, Kaplin required as a condition to instituting the Additional Actions on behalf of Hankin and Realen, and Realen required as a condition to agreeing to pay the cost of the Additional Actions that Timoney agree, on behalf of himself and Hankin, that if Realen determines, in its sole discretion, that it is desirable or prudent to settle either or both of the Additional Actions, Realen shall have the authority to cause Kaplin to settle either or both of the Additional Actions on behalf of Hankin and the consent of Hankin and/or Timoney shall not be required; but only if any such settlement shall entitle Realen to develop the Property for the Permitted Uses . . . . Realen shall not have the right to cause the settlement of the Additional Actions in a manner that would not permit the development of the Property for the Permitted Uses . . . . Any settlement negotiated

> by Realen shall include a release by the Township and the other defendants in the Additional Actions of all claims and actions which they have against Hankin and/or Timoney.

Timoney's primary interest in the Additional Actions changed to an award of money damages as a result of the decision in the zoning litigation, *In re Appeal of Realen Valley Forge Greenes Assoc.*, 576 Pa. 115, 838 A.2d 718 (2003) invalidating the zoning of the Property and allowing Realen to proceed with commercial development, and Realen's decision to exercise its right to close on the Property before obtaining final development approvals. Once the Pennsylvania Supreme Court granted Realen zoning relief and Realen paid over $27,000,000 to purchase the Property, Timoney's sole interest in prosecuting this case became a potential monetary award because no other relief could be obtained.

After closing on the Property, Realen continued prosecution of the Additional Actions and, for example, filed a motion for summary judgment on the equal protection claim. *See Timoney v. Upper Merion Twp.*, 2004 WL 2823227 (E.D.Pa. 2004). Realen was simultaneously pursuing settlement discussions with the Township, which approached Realen in January of 2004 with the concept that Realen could proceed with a different plan of development if the Additional Actions seeking damages could be dismissed.

By the fall of 2004, the settlement discussions with the Township had reached a point where Realen believed that it would be appropriate to slow down the damages litigation and ultimately stay the Additional Actions.[2] Realen and the

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[2] Although Timoney characterizes Realen's request by e-mail that joint counsel "put the brakes on" the litigation as a nefarious

(Cont'd)

Township requested the District Court in this case and the State Court in the inverse condemnation action to enter orders staying all proceedings pending settlement negotiations between the Township and Realen, which could result in a global settlement of all litigation. The District Court entered the requested stay order on December 19, 2004.

When Timoney was advised that the Additional Actions were going to be stayed, he objected because the stays had the potential to impact a claim for payment from Realen of additional money under the agreement for purchase of the Property. In response, Realen informed Timoney that it had the ability under the AJPA to stay the Additional Actions in pursuit of its right to reach a global settlement without his consent that would result in development of the Property. Timoney petitioned the State Court to lift the stays of the Additional Actions under the disputes resolution provisions of the AJPA.[3] In response, Realen, through Kaplin Stewart, instituted a declaratory judgment action against Timoney and Hankin seeking a determination that it does not have to pay any additional funds under the contract for purchase of the Property (the "Declaratory Judgment Action"), which is now pending in the State Court.

(Cont'd)
plot, he does so out of context and fails to inform the Court that Realen requested that the pace of the litigation be slowed due to a concern that the litigation was "moving too quickly and might produce a result (either positive or negative) which would impair our ability to settle the zoning issues with the Township." Realen's goal has always remained consistent with the stated objective of the AJPA to use the Additional Actions as a means to permit development of the Property.

[3] The AJPA contemplates that if Timoney disagrees with any "significant action" joint counsel intends to take, he will submit that dispute to the State Court.

B. Proceedings Below And Developments During Pendency

The merits of this case involve the assertion of civil rights violations under 42 U.S.C. § 1983 by Timoney and Realen against the Township arising out of its refusal to change the zoning of the Property to allow commercial development. The litigation was stayed pending settlement negotiations between the Realen and the Township for nearly a year until Timoney retained his own separate counsel and filed the motion giving rise to the Petition.

In November 2005, through their separate counsel, Timoney and Hankin filed a motion to disqualify Kaplin Stewart in the Declaratory Judgment Action (the "State Court Motion"). The State Court Motion requested that Kaplin Stewart be disqualified from representing Realen by asserting that, *inter alia*: (a) the representation was in violation of Pennsylvania Rule of Professional Conduct ("Pa.R.P.C.") 1.7 or 1.9 or common law because of the concurrent representation of Timoney as joint counsel; (b) Kaplin Stewart had "failed to obey and refused [Timoney's] requests that they withdraw as counsel for Timoney in the state and federal litigations"; and (c) Timoney had terminated Kaplin Stewart and its refusal to withdraw from this action was "a continuing conflict of interest".

Separate counsel chosen by Timoney then filed his motion to terminate or disqualify Kaplin Stewart as joint counsel in the District Court (the "Federal Court Motion"), asserting the same arguments for disqualification on alleged violation of Pa.R.P.C. 1.7 or 1.9 or common law raised in the State Court Motion. In addition, Timoney argued that he had the absolute right to terminate joint counsel under Pa.R.P.C. 1.16. Realen responded to the Federal Court Motion by, *inter alia,* pointing out that disqualification of

joint counsel was being sought in order to abrogate Realen's right under the AJPA to direct joint counsel to settle this case without Timoney's consent. On January 17, 2006, the District Court held an off the record conference with counsel at which, *inter alia,* separate counsel for Timoney disclosed that the objective of the motion was to remove joint counsel so that Timoney could proceed with the litigation on the merits, thereby foiling Realen's efforts to settle with the Township.

Thereafter, the State Court orally advised counsel that the State Court Motion was denied as to disqualification of Kaplin Stewart, but granted under Pa.R.P.C. 3.7 as to disqualification of two attorneys in the firm who were potential witnesses. The next day, the District Court held a hearing on the Federal Court Motion, at which the motion was orally denied without prejudice and Timoney was then ordered to request the State Court "to interpret the [AJPA] insofar as it relates to any right of the Receiver to prosecute this action separately". Petition at 5a.

The District Court found that the AJPA "is not really an attorney-client agreement, it's an agreement between two parties, it's a business deal, pure and simple." Petition at 38a. The District Court further found that the disputes raised by the motion to disqualify and terminate Kaplin Stewart were to be presented to the State Court under the disputes resolution clause of the contract; that under that clause, the Receiver was obligated to participate in or initiate declaratory judgment actions in the State Court to resolve such disputes; that the State Court was already presented with some of those disputes in the form of a very similar motion to disqualify pending before it; and that comity required the District Court to refrain from substituting its judgment on interpretation of the contract, which the State Court had approved and entered as its order. Petition at 36a-39a.

When the State Court entered its initial order on the State Court Motion, it specifically found that Timoney had waived and consented to the claimed conflict and further found that:

> In deciding not to disqualify the law firm of Kaplin Stewart, this Court finds that the law firm of Kaplin Stewart, Marc Kaplin, Esq. and Kevan Hirsch, Esq. represented only the Plaintiff in the negotiation and drafting of the Amended Purchase Agreement and the Joint Representation and Prosecution of Litigation Agreement. This Court declines to find that this law firm and these counsel violated any rules of professional conduct regarding concurrent conflicts of interest by filing the Complaint in Declaratory Judgment that is the subject of the present pending matter.

The District Court thereafter entered its Order of March 13, 2006, which included an invitation to seek certification under 28 U.S.C. § 1292(b). Timoney declined the invitation to move for certification and initiated two separate proceedings in the Court of Appeals: (1) he filed a Notice of Appeal citing § 1291, § 1292(a)(1) and the collateral order doctrine (the "Appeal"); and (2) he concurrently filed a Petition for Writ of Mandamus (the "Mandamus Petition"). When Timoney moved to consolidate those proceedings, Realen opposed the motion and cross-moved to dismiss the Appeal for lack of appellate jurisdiction, citing *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) and *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981).

Realen also presented the Court of Appeals with a motion to dismiss the Mandamus Petition as moot or barred by collateral estoppel. Realen brought that motion for three reasons based on proceedings in the State Court that occurred after filing of the Mandamus Petition, which served to render it moot. First, immediately after filing the Mandamus

Petition, Timoney began presenting the State Court with every factual and legal argument raised in the District Court to justify termination and disqualification of Kaplin Stewart as his counsel in this action and thereby effectively complied with the District Court's order to seek an interpretation of the AJPA. Second, the State Court declined to accept Timoney's original arguments, but nevertheless issued a decision disqualifying Kaplin Stewart, apparently based on the State Court's interpretation that a non-consentable conflict was present. Third, Realen elected not to seek reconsideration of the State Court disqualification,[4] but proceeded to obtain new counsel in the Declaratory Judgment Action so that the concurrent conflict on which Timoney's Mandamus Petition relied so heavily no longer existed.

On the first business day after filing the Mandamus Petition complaining that the District Court had improperly referred termination of joint counsel to the State Court, Timoney began to comply with the District Court's order by affirmatively presenting the State Court with the question whether he had the absolute right to terminate joint counsel in this action. On March 20, 2006, separate counsel for Timoney presented the State Court with a letter requesting a hearing on informed waiver due to "compelling circumstances", including the fact that Kaplin Stewart had "impermissibly and unethically refuse[d] to withdraw its appearances for [Timoney] and Hankin in the Additional Actions after having been discharged" and that "[t]here was no informed waiver that Kaplin [Stewart] would refuse to withdraw as [Timoney's] counsel after being expressly terminated".

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[4] Realen was precluded under Pennsylvania law from taking an interlocutory appeal of the State Court order because disqualification determinations are not considered to be appealable collateral orders. *See, Vaccone v. Syken*, 889 A.2d 1103, 1107 (Pa. 2006).

The State Court then entered an order setting an evidentiary hearing and oral argument ". . . for further consideration and possible modification of the Court's Order of March 7, 2006." At the State Court hearing on April 7, 2006, Timoney did exactly what the District Court's order directed by presenting evidence and oral argument on disqualification and whether Timoney had the absolute right to terminate Kaplin Stewart as counsel in this action under Pa.R.P.C. 1.16. The State Court rejected that argument stating that: ". . . you have an agreement here that talks about representation. I read that carefully yesterday. I['ve] got to tell you, I don't think Mr. Timoney can discharge Kaplin."

After hearing Timoney's evidence, the State Court Judge also said that "I still think that there was an informed waiver of this, but I am very concerned about [Rule of Professional Conduct 1.7(b)(3)]" and whether that rule prohibited such a waiver as a "non-consentable conflict". The State Court then issued an order for counsel to submit ". . . memoranda on the limited issue whether Pennsylvania Rule of Professional Conduct 1.7(b) prohibits a waiver of the conflict of interest in matters such as the one at bar."

The memorandum submitted to the State Court by Timoney argued that Pa.R.P.C. 1.7(b)(3) should be interpreted to make the conflict non-consentable, urged the State Court to change the findings in its March 7, 2006 Order on consent by Timoney and ethical conduct by Kaplin Stewart, and for the third time, presented the State Court with the argument that Timoney had the absolute right to terminate joint counsel in this case despite the AJPA.

On April 28, 2006, in keeping with its concerns that a non-consentable conflict existed, the State Court issued an order disqualifying the entire Kaplin Stewart firm for "the reasons set forth in Pa.R.P.C. 1.7." The State Court did

not, however, modify or vacate any of the findings on waiver, consent and ethical conduct by Kaplin Stewart in its previous order.

In moving to dismiss the Mandamus Petition, Realen pointed out that while Timoney complained that the District Court failed to exercise its jurisdiction by directing him to State Court, Timoney had rendered the proceedings moot by essentially following the District Court's directive in presenting evidence and argument on the question of termination to the State Court judge responsible for resolving disputes under the AJPA.[5] Realen further pointed out to the Court of Appeals that as a result of the State Court's order disqualifying the Kaplin Stewart firm, Realen was obtaining new counsel in the Declaratory Judgment Action so that the concurrent conflict on which the Federal Court Motion was based, the representation adverse to Timoney in the State Court, no longer existed.

During the pendency of proceedings in the Court of Appeals, Realen and the Township completed their negotiations and executed a final, comprehensive Settlement Agreement. Insofar as it is relevant here, the Settlement Agreement contemplates that Realen will obtain a dismissal with prejudice of this case and the State Court inverse condemnation action, in exchange for which, the Township

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[5] An issue is moot "when it no longer presents a 'live controversy'." *Hudson v. Robinson*, 678 F.2d 462, 465 (3d Cir. 1981). The question whether Timoney must comply with the District Court's alleged "mandatory injunction" directing him to proceed in State Court is no longer a live controversy as Timoney has complied with the "injunction" and the State Court has rejected his contentions. "Where activities sought to be enjoined have already occurred, and the appellate courts cannot undo what has already been done, the action is moot." *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1379 (9th Cir. 1978); *accord McKee & Co. v. First Nat'l Bank of San Diego*, 397 F.2d 248 (9th Cir. 1968) (per curiam).

will permit development of additional density on the Property. Having been advised of the Settlement Agreement, the District Court has directed Realen to file a motion to dismiss this case with prejudice so as to allow the Receiver an opportunity to be heard in opposition to dismissal. That motion has been filed, fully briefed by all parties and is presently awaiting disposition by the District Court.

REASONS FOR DENYING THE PETITION

The Third Circuit's Dismissal of the Appeal for Want of Appellate Jurisdiction is in Harmony with This Court's Decisions and All Other Circuits

Timoney argues that *certiorari* should be granted to review the Third Circuit's dismissal of his Appeal from denial of a motion to disqualify his own counsel for want of appellate jurisdiction, but makes no attempt to establish that the Third Circuit's decision is in conflict with any decision of this Court or another Circuit Court or that an unresolved federal question is involved. Instead, he attempts to distinguish settled and uniformly followed precedent of this Court, claims that the Third Circuit "ignored" one of its own allegedly conflicting decisions and freely admits that his disqualification motion involved an issue of Pennsylvania policy and law.

Over twenty years ago, this Court settled the issue of appellate jurisdiction now raised by Timoney. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) and *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981) hold that a district court's grant or denial of a motion to disqualify counsel in a civil case is not appealable under 28 U.S.C. § 1291 or the collateral order doctrine. *Flanagan v. U.S.*, 465 U.S. 259 (1984) similarly held that pretrial orders disqualifying defense counsel in criminal cases are not

subject to immediate appeal. While foreclosing an appeal, those decisions indicate that interlocutory appellate review of such an order may be available through certification for immediate appeal pursuant to 28 U.S.C. § 1292(b) or a writ of mandamus. *Firestone,* 449 U.S. at 378, fn. 13 (1981) ("if . . . it will be harmed irreparably, a party may seek to have the question certified for interlocutory review and, in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals may be available"). Here, Timoney declined the District Court's invitation to file a motion for § 1292(b) certification, electing instead to pursue both the Appeal and the Mandamus Petition in the Court of Appeals.

In the Petition, Timoney disingenuously claims that the Third Circuit relied "exclusively" on *Richardson-Merrell,* asserting that case does not apply because it involved disqualification of an opposing party's counsel whereas his motion to disqualify his own counsel was denied, allegedly depriving him of the right under Pennsylvania law to terminate joint counsel and choose another.[6] He does not even mention *Firestone*, which explicitly held that "orders denying motions to disqualify are not appealable final decisions under § 1291" or the collateral order doctrine. 449 U.S. at 370, 375. Nor does he acknowledge that *Richardson-Merrell* decided the question left open in *Firestone* of whether granting disqualification of a party's counsel should be immediately appealable. Thus, the Third Circuit's citation of *Richardson-Merrell* is appropriate because the case goes hand-in-hand with *Firestone* and it involves, as all orders disqualifying a party's counsel do, a situation where a party

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[6] It should be noted at present that while Kaplin Stewart remains as counsel of record for Timoney, he is also concurrently represented in this case by separate counsel of his choice, who has been and remains free to present any position or argument believed to benefit Timoney's interests.

is deprived of the right of representation by counsel of its choice. The District Court's Order is simply not appealable prior to a final decision on the merits and Timoney has given this Court no reason, let alone any compelling one, to consider overruling over two decades of precedent.

While Timoney attempts to distinguish *Richardson-Merrell* on various grounds, including the fact that he seeks to discharge his own counsel, he cannot escape the fact that he appealed denial of a motion for disqualification of counsel in a civil case. No Circuit Court case he cites questions the holdings of *Firestone, Richardson-Merrell* and *Flanagan*. Rather, a whole body of Circuit Court case law has developed from the suggestion in *Firestone* that immediate review by § 1292(b) certification or writ of mandamus may be appropriate. In fact, the one Circuit Court case cited by Timoney which does involve a party's attempt to disqualify its own counsel was decided on a petition for mandamus after the district court denied § 1292(b) certification. *In re Dresser Industries, Inc.*, 972 F.2d 540, 542 (5th Cir. 1992). Appeals in other similar cases have met the same fate as Timoney's did in the Third Circuit. *See, e.g., Arney v. Finney*, 967 F.2d 418 (10th Cir. 1992) (no jurisdiction to consider appeal of denial of motion to "terminate" counsel representing class of which movant was a member).

Timoney also claims that the Third Circuit's dismissal of his Appeal is contrary to one of its criminal cases treating a disqualification as a collateral order. The underpinning of this Court's cases that disqualification decisions are not within the collateral order doctrine is the fact that those orders will be reviewable after an adverse final judgment on the merits. The one exception to that basic premise is where the United States Attorney or its local office is disqualified in a criminal matter, for the government may be prohibited from appealing the disqualification by the Double Jeopardy clause

or the context of the criminal proceeding. As a result, in *U.S. v. Whittaker*, 268 F.3d 185 (3d Cir. 2001), the Third Circuit held that an order disqualifying the United States Attorney's office from participating in grand jury proceedings is appealable under the collateral order doctrine because the decision would otherwise be unreviewable. In *Whittaker*, the Third Circuit noted that *Flanagan* left open the question whether disqualification of the United States Attorney was immediately appealable as an otherwise unreviewable decision, noting that *Flanagan* in the criminal context and *Richardson-Merrell* in the civil arena both involved situations where disqualification could be challenged after final judgment. 268 F.3d at 192-93.

Accordingly, the Third Circuit did not, as Timoney contends, "ignore" *Whitaker*; the case simply has no application to a civil matter where Timoney can eventually obtain appellate review. Given that the District Court is currently considering dismissal of this entire case with prejudice over Timoney's objections, his opportunity for review after a final judgment may be fast approaching.

Throughout the Petition, Timoney attempts to characterize himself as a victim of rogue counsel being forever deprived of the allegedly "undisputed" fundamental right under Pennsylvania law to discharge counsel.[7] Even if that were so, he will eventually have the opportunity to attempt to vindicate his rights before an appellate court. As this Court said in *Firestone*:

> An order refusing to disqualify counsel plainly falls within the large class of orders that are indeed

[7] Both Timoney's characterization of himself as victim and his claim of an "undisputed" right to terminate counsel have been rejected by the trial courts before whom he has appeared. The District Court found that the joint representation agreement was a "business deal" between Timoney and Realen and the State Court has indicated that Timoney cannot unilaterally terminate counsel under that contract.

> reviewable on appeal after final judgment, and not within the much smaller class of those that are not. The propriety of the district court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally only after final judgment. The decision whether to disqualify an attorney ordinarily turns on the particular factual situation of the case then at hand, and the order embodying such a decision will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits.

449 U.S. at 377. Thus, Timoney's opportunity for appellate review will come, but he has offered no compelling reason for this Court to consider whether it should come now.

The Third Circuit's Rejection of Timoney's Argument That an Appealable Injunction was Imposed is Entirely Consistent with This Court's Decisions

In his argument that the Third Circuit should have treated the District Court's directive to obtain an interpretation of the AJPA from the State Court as a mandatory injunction appealable under 28 U.S.C. § 1292(a)(1), Timoney makes no attempt to show that the decision below is contrary to one by this Court or another Circuit Court or to identify an unresolved federal question. Indeed, he cannot do so because the Third Circuit's dismissal of the Appeal under § 1292(a)(1) is in perfect harmony with decisions of this Court and other Circuits.

Timoney's attempt to characterize the District Court order as a mandatory injunction appealable under 28 U.S.C. § 1292(a)(1) is totally undermined by his assertion that he

was "require[ed] to file his Motion to Discharge and Disqualify his own counsel in this federal action in the State Court." Petition at 14. That motion and the directive to seek a State Court interpretation are wholly unrelated to the merits of the 42 U.S.C. § 1983 claims against the Township and this Court's decisions assume that a disqualification decision in general "resolves an important issue completely separate from the merits". *Richardson-Merrell*, 472 U.S. at 431. By asserting that an order wholly unrelated to the civil rights claims in this case is appealable under § 1292(a)(1), Timoney has again raised an issue settled long ago by this Court.

"Orders that in no way touch upon the merits of the claim but only relate to pretrial procedures are not . . . 'interlocutory' [injunctions] within the meaning of § 1292(a)(1)." *Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966); *accord*: *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988). Even before those cases were handed down, it was recognized that the types of injunctions appealable under § 1292(a)(1) do not include "restraints or directions in orders concerning the conduct of the parties or their counsel, unrelated to the substantive issues in the action, while awaiting trial." *International Products Corp. v. Koons*, 325 F.2d 403, 406 (2d Cir. 1963). The direction in the order that Timoney characterizes as a mandatory injunction relates solely to pretrial issues regarding joint representation and the contracts between Realen and Timoney.

In his injunction argument, Timoney fails to cite any case decided by this Court or a Circuit Court which is contrary to the Third Circuit's disposition and no attempt is made to identify an unresolved federal question. Moreover, Timoney rendered the issue moot as more fully discussed below.

The Third Circuit's Refusal to Accept Timoney's Argument That an Appealable Abstention-Based Stay Was Entered is in Accord With Decisions of This Court

Timoney also complains that the Third Circuit should have treated the District Court's directive to seek an interpretation of the AJPA by the State Court as an abstention order, but cannot identify just which abstention doctrine was supposedly applied, finally speculating that *Colorado River* abstention must have been employed because Realen raised that case before the District Court. Petition at 16. Contrary to the cursory contention in the Petition (at 17), not all abstention-based stay orders are immediately appealable. To qualify for interlocutory appeal, they must either meet the finality test of 28 U.S.C. § 1291 by putting the litigants "effectively out of court" or qualify under the collateral order doctrine. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 11 (1983).

As this Court has explained:

> . . . we also held that the stay order at issue in *Moses H. Cone* was appealable under the collateral order doctrine. We determined that a stay order based on the *Colorado River* doctrine presents an important issue separate from the merits because it amounts to a refusal to adjudicate the case in federal court; that such orders could not be reviewed on appeal from a final judgment in the federal action because the district court would be bound, as a matter of *res judicata,* to honor the state court's judgment; and that unlike other stay orders, which might readily be reconsidered by the district court, abstention-based stay orders of this ilk are conclusive because

> they are the practical equivalent of an order dismissing the case.

Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 713 (1996) (citations omitted). Timoney was certainly not put out of court or deprived of a federal adjudication on disqualification that cannot be reviewed on appeal from final judgment because the District Court denied his motion without prejudice.

As a matter of comity, the District Court further:

> ordered that this action is stayed pending application by the Receiver to the [State Court] to interpret the [AJPA] insofar as it relates to any right of the Receiver to prosecute this action separately where Realen seeks, with Township consent, a global resolution of all litigation in state and federal courts.

This stay is distinguishable from other appealable abstention orders as the court both denied Timoney's motion without prejudice and stayed the case pending Timoney's application to the State Court. Where a district court stays proceedings, the order is not appealable when it "simply defers or postpones resolution of an action in federal court [and is] only a temporary measure not subject to appeal under 28 U.S.C. § 1291." *Spring City Corp. v. Am. Bldgs. Co.*, 193 F.3d 165, 171 (3d Cir. 1999). The decision would be appealable only if the district court "surrendered its jurisdiction to a state court and a decision in state court would have preclusive effect on the federal action." *Id.*

Moreover, this Court has upheld decisions similar to that of the District Court. In *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 30-31 (1959), the Court stated that in directing federal litigants to state court, "[t]he District

Court was thus exercising a fair and well-considered jurisdictional discretion in staying proceedings pending the institution of a declaratory judgment action and subsequent decision by the Supreme Court of Louisiana." *See also, Quackenbush*, 517 U.S. at 719-720 (collecting cases postponing federal decisions pending state court decision). If the District Court did abstain from deciding Timoney's motion, it did so as a temporary measure under *Thibodaux*.[8] Such temporary stays are not appealable. *Nemours Foundation v. Manganaro Corp., New England*, 878 F.2d 98 (3d Cir. 1989) (dismissing appeal from order certifying questions to Delaware Supreme Court because it did not terminate federal litigation, which would continue following certification); *In re Kozeny*, 236 F.3d 615 (10th Cir. 2000) (abstention-based stay orders that merely delay federal proceedings are not subject to immediate appeal, even where state court could conclusively determine some of issues in federal case); *Boushel v. Toro Corp.*, 985 F.2d 406 (8th Cir. 1993) (same).

Thus, while Timoney finally points to a federal question, it is one that has been decided by this Court and the Third Circuit's treatment of his abstention argument is not in conflict with those decisions or any other Circuit Court case.

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[8] Any delay in federal adjudication from an abstention is now over because the District Court has apparently concluded, as the Court of Appeals did, that Timoney effectively complied with the directive to seek an interpretation of the AJPA from the State Court. While the District Court initially indicated that a post-appeal conference would be held on status of compliance with its March 13, 2006 Order, it has dispensed with that inquiry and reopened the case by directing Realen to move for dismissal with prejudice. It is no longer necessary for Timoney to apply to the State Court for an interpretation of the AJPA.

Petitioner Offers No Reason Whatsoever to Grant *Certiorari* to Review the Third Circuit's Finding that His Mandamus Petition is Moot

Noticeably absent from the Petition is any argument that there is some compelling reason to grant it with respect to the Third Circuit's disposition of the Mandamus Petition. Indeed, Timoney merely mentions that the Mandamus Petition was dismissed "as moot and/or lacking merit." Petition at 8. Timoney then pretends to be puzzled by this pronouncement, stating that ". . . the Panel did not provide any explanation or citation for denial of the Petition for Writ of Mandamus." *Id.*

In a total lack of candor, counsel for Timoney has failed to disclose in the Petition that Realen filed a comprehensive motion to dismiss the Mandamus Petition as moot that was vigorously opposed. Timoney fails to mention even one of the numerous orders, hearings, and briefs upon which that motion was based by Realen and granted by the Third Circuit. Indeed, even the most liberal reading of the Petition would lead one to conclude that the Third Circuit dismissed the Mandamus Petition *sua sponte* based on events as they stood on the day it was filed.

But the day after the Mandamus Petition was filed, counsel for Timoney began a relentless campaign to have the State Court reverse its ruling that Kaplin Stewart's representation of Realen in the Declaratory Judgment Action was appropriate. During that campaign, Timoney and his counsel effectively complied with the District Court's directive to apply to the State Court for an interpretation of the AJPA by arguing to the State Court that Timoney had the absolute right to terminate joint counsel and separately prosecute this federal case through his own counsel despite the terms of the AJPA.

Perhaps the result in the State Court, which found that no ethical violations had occurred and indicated that the AJPA prevented unilateral termination of joint counsel by Timoney, explains why the Petition does not challenge the dismissal based on mootness. It is facetious to contend, as Timoney did in opposition to Realen's motion to dismiss the Mandamus Petition, that the State Court did not have before it the arguments which Timoney's own counsel made to the State Court in a letter brief, during an evidentiary hearing, and in a post-hearing memorandum.

The Petition does not even assign error to the Third Circuit's finding that the Mandamus Petition is moot. In the alternative to his appellate jurisdiction arguments and almost as an afterthought, Timoney simply contends that the highly discretionary writ of mandamus "is required". Petition at 17. There is no reason for this Court to grant *certiorari* to review this mere contention, which is all that remains after the actions of his counsel before the State Court rendered the request for mandamus moot.

Petitioner Offers No Reason Why This Court Should Review the Third Circuit's Determination That His Mandamus Petition Lacks Merit and Plainly, It Does

Rather than address the reasons why this Court should consider granting *certiorari* as to the Third Circuit's dismissal of his Mandamus Petition for lack of merit, Timoney simply repeats some of the arguments made below, as if they will gain merit through mere repetition. The Third Circuit's dismissal came after both Timoney's opening brief on the Mandamus Petition and Realen's brief in opposition were filed. A short summary of the arguments fully made in Realen's brief in opposition to the Mandamus Petition will suffice to show that it plainly lacks merit and demonstrate that this Court should not grant *certiorari* to reach the same conclusion.

This Court has established three prerequisites to the issuance of a writ of mandamus:

> First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires," – a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy "the burden of showing that [his] right to issuance of the writ is "clear and indisputable." Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 380-381 (2004) (citations omitted).

Timoney simply cannot establish that his right to the extraordinary writ of mandamus is "clear and indisputable". While Timoney characterizes the issue as one involving a client's absolute right to terminate his own counsel, he dismisses the AJPA and his obligations to Realen under that contract by erroneously asserting that the AJPA is merely a fee agreement with joint counsel. Timoney ignores the fundamental nature of the AJPA, that is, a "business deal" approved as an order of the State Court, which gives Realen the unilateral right to settle this litigation. Timoney agreed to limit the scope of joint counsel's representation of him to prosecution of the Additional Actions, and the AJPA reflects Timoney's agreement with Realen that the Additional Actions were a means by which to develop the Property and that Realen, as the developer paying the fees and costs incurred to prosecute them, would have the ability to instruct joint counsel to settle the litigation in the event that a conflict of interest arose between Realen and Timoney. In the event of

that conflict, the AJPA provides that Realen shall have the ability to settle the litigation in exchange for the ability to develop the Property, which was the stated objective of the Additional Actions. Accordingly, Timoney's alleged right to terminate joint counsel with Realen is not clear and indisputable; it is contrary to the express provisions of the AJPA.

Similarly, Timoney cannot establish a clear and indisputable right to have joint counsel disqualified. He presented the disqualification motion to the District Court so that he might obstruct Realen's ability to settle the litigation pursuant to the terms of the AJPA and subsequently develop the Property. While the motion was based upon joint counsel's adversarial role against Timoney in the State Court, the State Court held that the concurrent conflict had been waived, expressly stated that no Pa. R.P.C. violations had occurred and indicated that Timoney could not unilaterally discharge joint counsel under the AJPA. The Mandamus Petition was nothing more than a veiled request that the Third Circuit review those State Court rulings in violation of the *Rooker-Feldman* doctrine. Both the State Court's resolution of the disqualification motion and the terms of the AJPA are fatal to Timoney's allegedly clear and indisputable right to mandamus.

In short, the Third Circuit's conclusion that the Mandamus Petition, if not moot, lacks merit, was correct. As that conclusion does not conflict with any decision of this Court or any Circuit and involves no unsettled issue of federal law, there is no reason for this Court to review it on a writ of *certiorari*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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